(1)

No. 90-855

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LUMBERMEN'S UNDERWRITING ALLIANCE,
Petitioner,

versus

ATLANTIC WOOD INDUSTRIES, INC.,
Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Must the Georgia Court of Appeals apply the Full Faith and Credit clause of the U. S. Constitution and 28 U.S.C. § 1738 and dismiss a pending appeal once a judgment of a sister state, which would dispose of the matter, became final?

RULE 29.1 STATEMENT AND PARTIES TO THE PROCEEDING

Lumbermen's Underwriting Alliance states that it is a reciprocal insurance exchange, an unincorporated association of which its insureds are the members.

U. S. Epperson Underwriting Company, a Missouri corporation and a member company of the Lynn Insurance Group, manages Lumbermen's Underwriting Alliance.

In addition to the parties shown in the caption of this petition, other parties to the appeal in the Court of Appeals of the State of Georgia, the judgment of which Lumbermen's Underwriting Alliance seeks review in this Court by writ of *certiorari*, are:

Insurance Company of North America;
Continental Casualty Company; and
Ranger Insurance Company.

Lumbermen's Underwriting Alliance does not believe these three parties to the proceedings in the Georgia Court of Appeals have any interest in the outcome of this Petition.

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PETITION FOR WRIT OF *CERTIORARI*

The petitioner, Lumbermen's Underwriting Alliance ("LUA"), by counsel, respectfully prays that a writ of *certiorari* issue to review the refusal of the Court of Appeals of the State of Georgia to honor the Full Faith and Credit clause of the United States Constitution. The court of appeals refused to grant a motion to dismiss an appeal when presented a favorable, final judgment from Virginia disposing of the controversy pending before it.

REFERENCE TO OPINIONS

The opinion of the Georgia Court of Appeals which LUA asks this Court to review, *Atlantic Wood Industries, Inc. v. Lumbermen's Underwriting Alliance, et al.*, is reported at 196 Ga. App. 503, 396 S.E.2d 541 (1990), and printed in Appendix A at A-1 to A-9. The order of the Georgia Court of Appeals denying LUA's motion for rehearing is printed in Appendix A at A-10 to A-11. The order of the Supreme Court of the State of Georgia, dated September 4, 1990, refusing the petition for *certiorari* of LUA is printed in Appendix A at A-12. The Georgia trial court's opinion and order is printed in Appendix A at A-13 to A-25.

LUA sets forth in Appendix B various pleadings from proceedings before the courts of Virginia which it sought to have granted full faith and credit by the Georgia Court of Appeals. LUA seeks no review of the Virginia opinions in this Court. The order of the Supreme Court of Virginia in *Atlantic Wood Industries, Inc. v. Lumbermen's Underwriting Alliance*, Record No. 890559, August 14, 1989, denying the petition for appeal of Atlantic Wood Industries, Inc. ("AWI") from the decision of the Circuit Court of the County of Henrico, Virginia in *Lumbermen's Underwriting Alliance v. Atlantic Wood Industries, Inc.*, Law No. 86-L-350, February 10, 1989, is printed in Appendix B at B-1, while the September 22, 1989 order of the Virginia Supreme Court granting Atlantic Wood Industries a rehearing but, again, denying its petition for appeal therein is printed in Appendix B at B-2 to B-3. The Final Judgment Order of the Virginia trial court from which Atlantic Wood Industries unsuccessfully petitioned the Virginia Supreme Court is printed in Appendix B at B-4 to B-5.

STATEMENT OF GROUNDS FOR JURISDICTION

The decision of the Court of Appeals of the State of Georgia referred to above decided an important question of federal constitutional and statutory law which has not been, but should be, settled by this Court. The Court of Appeals gave preeminence to a Georgia procedural statute over the Full Faith and Credit clause of the United States Constitution and the provision of the United States Code implementing that constitutional mandate and, as a result, refused to dismiss an appeal despite a Virginia judgment which became final during the pendency of the Georgia appeal. Rather, the court of appeals proceeded with the appeal and decided the issue before it adversely to LUA and adversely to the judgment LUA had obtained in Virginia.

(i) The court of appeals entered its judgment on July 12, 1990.

(ii) The court of appeals refused the timely petition for rehearing of LUA on July 25, 1990.

(iii) The Supreme Court of the State of Georgia refused the timely petition for writ of *certiorari* of LUA on September 4, 1990.

(iv) 28 U.S.C. § 1257 confers jurisdiction upon this Court to review the judgment of the Court of Appeals of the State of Georgia.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Full Faith and Credit clause of the United States Constitution is involved in this matter and provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State and the Congress may by General Laws prescribe the Manner in which Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

The following provision of the United States Code is involved in this matter:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and the seal of the court annexed, if a seal exists, together with a certificate of a judge that the said attestation is in the proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the

> courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

The following provision of the Official Code of Georgia is involved in this matter:

> No appeal shall be dismissed or its validity affected for any cause nor shall consideration of any enumerated error be refused, except:
>
> (1) For failure to file notice of appeal within the time required as provided in this article or within any extension of time granted hereunder;
>
> (2) Where the decision or judgment is not then appealable; or
>
> (3) Where the questions presented have become moot.

O.C.G.A. § 5-6-48 (b).

STATEMENT OF THE CASE

LUA asks this Court to review the refusal of the Georgia Court of Appeals to dismiss, in the face of the Full Faith and Credit clause and the statute implementing it, an appeal involving issues on which LUA had obtained a favorable, final judgment in Virginia. The court of appeals refused this relief: "The subsequent finality of the Virginia declaratory judgment action is not a ground for dismissing the instant appeals. Accordingly, LUA's motion to dismiss is denied." Appendix A at A-2 and A-3. The court then proceeded to decide the issue presented in the Georgia appeal against LUA and contrary to the final Virginia judgment rendered on the same issue.

The appeal arose from a decision of the Superior Court of Chatham County, Georgia granting summary judgment to LUA and other defendant insurers in a declaratory judgment action (the "Georgia action") filed by AWI. AWI sought a declaration in Georgia that LUA and the other defendant insurers owe it a defense against the efforts of the United States Environmental Protection Agency (the "EPA") to require AWI, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, to address alleged pollution at its wood treatment facility in Portsmouth, Virginia.

Before AWI began the Georgia action, LUA had instituted an action seeking a declaration in its favor in the Circuit Court of the County of Henrico, Virginia (the "Virginia action") that its policies provided AWI no coverage or entitlement to a defense against the EPA's efforts regarding the Portsmouth facility. The Virginia and Georgia actions proceeded on roughly parallel tracks, each trial court having the case submitted for decision on cross motion for summary judgment.

The Virginia action resulted in a final judgment[1] declaring, on a number of issues, (including the one ultimately decided by the superior court in the Georgia action) that LUA's policies impose no duty upon it to indemnify AWI for or defend it against its obligations to clean up or abate pollution at its Portsmouth, Virginia

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[1] *See* the Final Judgment Order of the Henrico Circuit Court, Appendix B at B-4, and the orders of the Supreme Court of Virginia refusing AWI's appeal therefrom. Appendix B at B-1 to B-3.

facility.[2] AWI then petitioned the Virginia Supreme Court for an appeal to review the ruling LUA received in its favor on summary judgment.

After receiving summary judgment in Virginia (but before AWI noted its appeal) LUA filed a *res judicata* plea[3] in the Georgia trial court, which had already received oral argument on the cross motions for summary judgment before it. While the Virginia action was pending on petition for appeal, the Georgia trial court granted LUA's substantive summary judgment motion, not reaching the *res judicata* motion. Appendix A at A-13 to A-25. The trial judge's decision rested upon a determination that those policies did not require the insurers to pay CERCLA response costs, as such costs do not constitute legal "damages," one of the same bases upon which the Virginia judgment rested.

AWI noted its appeal from the adverse rulings of the Georgia trial court to the Georgia Court of Appeals. During the pendency of the Georgia appeal, the Virginia Supreme Court refused AWI's petition for appeal, and LUA moved the Georgia Court of Appeals to dismiss the Georgia appeal as to LUA on the basis of *res judicata* and estoppel by judgment, asserting that the court of appeals must afford the then-final judgment of the Virginia Supreme Court full faith and credit.[4]

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[2] Although the EPA never filed suit, AWI and the EPA entered into a "Consent Order," following the EPA's notice by letter to AWI of its intent to include the Portsmouth facility on the CERCLA "Superfund list."

[3] *See* Appendix D at D-5.

[4] *See* LUA's motion to dismiss and memorandum in support thereof. Appendix C at C-1 to C-13. LUA will hereafter discuss its motion using only the term "*res* (continued...)

As noted, the court of appeals refused this relief and cited a Georgia procedural provision restricting the bases upon which it had the authority to dismiss an appeal.[5] Appendix A at A-2 and A-3.

The court of appeals refused LUA's motion for rehearing and the Georgia Supreme Court refused LUA's petition for writ of *certiorari*.

Citation to Raising of Federal Question

LUA first raised the issue of full faith and credit requiring the dismissal of the action as to LUA under the doctrine *res judicata* in Georgia by its Motion for a Protective Order,[6] citing the Full Faith and Credit clause of the U. S. Constitution, Appendix D at D-2, and its Plea of *Res Judicata* and Motion to Dismiss Plaintiff's Amended Motion for Declaratory Judgment, Appendix D at D-5, and its memorandum filed in support thereof in the trial court. LUA cited the trial court to *Fidelity*

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[4](...continued)
judicata" but does not thereby waive or omit the theory of estoppel by judgment.

[5] The court of appeals reversed the trial court's grant of summary judgment to LUA, determining that, under Georgia law, the word "damages" in the insuring agreement is ambiguous. Appendix A at A-5. This aspect of the court of appeals' ruling is not before this Court on petition.

[6] The protective order allowed LUA time to file its *res judicata* motion during which the trial court agreed to enter no ruling adverse to LUA's interests on summary judgment before ruling on its *res judicata* plea. The trial court, in the end, ruled in LUA's favor on its earlier filed substantive summary judgment motion.

Stand. Life Ins. Co. v. First Nat'l Bank & Trust Co., 510 F.2d 272 (5th Cir. 1975), a Fifth Circuit case discussing full faith and credit which relied for its authority upon, among other cases, *Durfee v. Duke*, 375 U.S. 106 (1963). Appendix D at D-9 to D-11. LUA's *res judicata* plea and motion filed in the Georgia trial court rested upon the arguable finality of the Virginia trial court's judgment order pending its appeal to the Virginia Supreme Court. The Georgia trial court never ruled on the plea and motion, having first granted LUA's substantive summary judgment motion which LUA had earlier filed.

Upon the Virginia Supreme Court's final rejection of AWI's petition for appeal, LUA again raised the constitutional requirement of the Full Faith and Credit clause by its December 12, 1989 Motion to Dismiss and memorandum in support thereof filed in the Georgia Court of Appeals wherein it stated that "[f]ull faith and credit requires this Court to enforce the judgment of the Virginia court. U. S. Const. Art. IV § 1." Appendix C at C-9.

Finally, LUA's Petition for Writ of Certiorari quoted the entire text of the Full Faith and Credit clause and 28 U.S.C. § 1738 to the Georgia Supreme Court as requiring the consideration by the Georgia Court of Appeals of LUA's motion at issue herein. Appendix E at E-1 to E-3.

ARGUMENT

A.
INTRODUCTION

"The concept of full faith and credit is central to our system of jurisprudence." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Guar. Ass'n.*, 455 U.S. 691, 703 (1982). At the

close of the twentieth century, the central place of the Full Faith and Credit clause in American federalism should be secure, and apparent. However, the Georgia Court of Appeals did not even pay lip service to the clause when it refused to dismiss, as to LUA, an appeal in which the same issue had already been decided by a Virginia judgment which became final during the Georgia appeal. Rather, Georgia placed its appellate procedure above the dictates of the United States Constitution. Thus, this matter presents an important question of federal constitutional and statutory law and an instance of clear error by the appellate courts of Georgia.

Specifically, this case presents the Supreme Court with the question of first impression whether these federal constitutional and statutory provisions require appellate courts in Georgia to give effect to a dispositive judgment of the Virginia Supreme Court which became final during the pendency of the appeal in Georgia involving the same issues and the same parties.

LUA's review of this Court's opinions which have addressed the Full Faith and Credit clause has revealed no case addressing this question. Certain cases involve the offensive use of the clause to execute upon a money judgment in a foreign state, an effort made in the forum state's trial court, *e.g., Mills v. Duryee*, 7 Cranch 481 (1813), while others address the defensive use at the trial stage of a foreign judgment then unequivocally final because no appeal was taken, *e.g., Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), or because the foreign appeal had concluded before the judgment was presented to the forum trial court. *E.g., Riley v. New York Trust Co.*, 315 U.S. 343 (1942).

This case falls outside these decisions, presenting the distinct circumstance of one appellate court refusing to honor the judgment of its sister state's court of last

resort, while acknowledging the sister state's judgment became final during the pendency of the appeal.

B.
History of the Full Faith and Credit Clause

The Full Faith and Credit clause of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State and the Congress may by General Laws prescribe the Manner in which Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. However, the concept of giving effect to the judgments of foreign states predates the birth of the American republic. The English courts began recognizing and giving effect to foreign judgments as early as 1536. *See* J. D. Sumner, *The Full-Faith-and-Credit Clause -- Its History and Purpose*, 34 Or. L. Rev. 224, 226 (1955). As early as the seventeenth century an English case held:

> [I]t is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right have one kingdom to reverse the judgment of another?

Kennedy v. Earl of Cassillis, 2 Swains. 313, 326, 36 Eng. Rep. 635, 640 (1818) (citing *Cottington's Case* (1678)).

Surprisingly, in light of the practice which had been established in the courts of England, courts in the colonies were initially unreceptive to the judgments of other colonies and countries, viewing them only as *prima facie* evidence, instead of as conclusive and binding judgments. However, by the middle of the seventeenth century, a trend arose towards granting greater significance to foreign judicial decrees. At least four colonies passed laws providing for the recognition of judgments from other colonies, culminating with Massachusetts in 1774. Sumner, *op. cit.*, at 227-228.

Following the Declaration of Independence, the first draft of the Articles of Confederation did not contain a provision requiring the recognition of foreign judgments. The Full Faith and Credit clause of the Articles was added along with several other last minute provisions. *Id.* at 229-230.

Despite its apparently mandatory language, the clause was not interpreted as requiring compliance by the states. Three of the four cases decided under the Full Faith and Credit clause of the Articles held the clause to be nothing more than a rule of evidence. *See Phelps v. Holker*, 1 Dall. 261 (Pa. 1788); *James v. Allen*, 1 Dall. 188 (Pa. 1786); *Kibbe v. Kibbe*, 1 Kirby 119 (Conn. 1786); *but see Jenkins v. Putnam*, 1 S.C. (1 Bay.) 8 (1784).

The records of the Constitutional Convention indicate that that body gave far more consideration to the concept of full faith and credit than did the Continental Congress. Although Article IV, §1 closely resembles the language of the Full Faith and Credit clause of the Articles, this resemblance grew from deliberation rather than merely copying the Articles of Confederation. Unlike the drafting of the Articles, a form of Full Faith and Credit clause appeared in the original draft of the Constitution. During the course of the debate, two significant events occurred. First,

although the Convention considered and adopted a committee report which replaced the mandatory "shall" with a less forceful "ought to," the Framers restored the mandatory "shall" upon motion by James Madison. Sumner, *op. cit.*, at 233-234. Second, the Convention added the sentence to the clause empowering Congress to prescribe the manner in which foreign judgments could be proved and the effect thereof. *Id.*

The Full Faith and Credit clause produced no controversy during the ratification of the Constitution, provoking no debate in the ratifying conventions of the various states, and the new Congress wasted no time in exercising the power conferred upon it by Article IV, §1, enacting the precursor of 28 U.S.C. § 1738 in 1790. Sumner, *op. cit.* at 235, 236. That enactment, in its present form, provides in pertinent part:

> [s]uch ... judicial proceedings or copies thereof ... shall have the same Full Faith and Credit in **every court** within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.

28 U.S.C. § 1738 (emphasis added).

Although certain questions remained about the meaning of the Full Faith and Credit clause and the Act of 1790, and early cases reached contradictory results, *see* K. H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts -- A Historical-Analytical Reappraisal*, 56 Mich. L. Rev. 33, 62-66, Mr. Justice James Wilson, who as a delegate to the Constitutional Convention from Pennsylvania actively participated in the debates concerning the adoption of the Full Faith and Credit clause, expressed his opinion on this issue while sitting as an associate justice of this Court on Circuit in 1794. He held a New Jersey judgment must be accorded the

same effect in Pennsylvania that it would receive in New Jersey stating

> whatever doubts there might be on the words of the Constitution, the Act of Congress effectually removes them; declaring in direct terms, that the record shall have the same effect in this court, as in the court from which it was taken.

Armstrong v. Carson, 1 Fed. Cas. No. 543 at 1140 (C.C. Pa. 1794).

This Court resolved any debate over the meaning of the implementing statute in *Mills, supra*, in which it stated that "we can perceive no rational interpretation of the Act of Congress, unless it declares a judgment conclusive, when a court of the particular state where it is rendered would pronounce the same decision." 7 Cranch at 485.

C.
The Virginia Judgment is Final And Entitled To Full Faith and Credit By the Appellate Courts of Georgia

AWI has fought and lost its battle with LUA over coverage in the courts of Virginia. The United States Constitution commands the courts of Georgia to honor that defeat. As this Court has explained:

> Ours is a union of States, each having its own judicial system capable of adjudicating the rights and responsibilities of the parties brought before it. Given this structure, there is always a risk that two or more States will exercise their power over the same case or controversy, with the

> uncertainty, confusion, and delay that necessarily accompany relitigation of the same issue. Recognizing that this risk inheres in our federal system, the Framers provided that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

Underwriters Nat'l, supra, 455 U.S. at 703, 704.

1.

SUMMARY OF VIRGINIA PROCEEDINGS

Since September, 1987, when LUA filed the Virginia action, it has been embroiled in coverage litigation with AWI concerning its dispute with the EPA over environmental contamination at the Portsmouth, Virginia facility. LUA's Amended Motion for Summary Judgment[7] in the Virginia action, to which AWI responded by filing its cross-motion for summary judgment,[8] presented the Virginia trial court with a broad range of issues including the very issues raised in the Georgia action between LUA and AWI.

The Virginia trial court ruled in favor of LUA as to all issues except one, which it assumed in AWI's favor but did not decide. AWI, thereafter, filed its Petition for Appeal in the Supreme Court of Virginia. On August 14, 1989, the Supreme Court of Virginia denied AWI's Petition for Appeal for the first time. AWI then petitioned the supreme court for a rehearing and moved for a remand of the case to the trial court.

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7 *See* Appendix D at D-18 to D-22.

8 *See* Appendix D at D-23 to D-25.

On September 22, 1989, the supreme court vacated its initial order, reheard the matter, again refused AWI's Petition for Appeal, and denied the Motion for Remand to the trial court. The Virginia Supreme Court held:

> The trial court entered [a]n order holding, "[p]laintiff's Motion for Summary Judgment on all other issues is hereby GRANTED". Among the issues decided by this holding is the question whether a suit, within the ambit of the policy provisions, had been filed, triggering [LUA's] duty to defend. The trial court's holding on the summary judgment motion decides this question adversely to [AWI]. Since [AWI] failed to raise this issue as an assignment of error, the trial court's ruling is dispositive.

Appendix B at B-2 and B-3.

In summary, LUA instituted the Virginia action before AWI filed its action in Georgia. LUA diligently pursued the declaratory judgment in the Virginia action, moving for and receiving summary judgment in Virginia. The Supreme Court of Virginia has refused AWI's appeal, and AWI has exhausted the appellate procedure in Virginia. LUA should not now be required to continue battling AWI over identical issues in the courts of Georgia when Virginia's courts have ruled on these issues and granted summary judgment in LUA's favor.

Indeed, as this Court has otherwise said,

> the very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore the obligations created ... by the judicial

> proceedings of the others, and to make them integral parts of a single nation.

Milwaukee County v. M. E. White Co., 296 U.S. 268, 276, 277 (1935).

2.

FULL FAITH AND CREDIT IN GEORGIA

The Full Faith and Credit clause of the United States Constitution, and federal legislation carrying that clause into effect, mandate that this Court reverse the judgment of the Georgia Court of Appeals denying LUA's motion to dismiss AWI's appeal.[9]

The Georgia Court of Appeals itself concluded that the Virginia judgment became final during the pendency of AWI's appeal before that court, yet failed to honor that judgment, despite the Full Faith and Credit clause, which established

> throughout the federal system the salutary principle ... that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a

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[9] Georgia also recognizes the Constitution's command in its statutory provision requiring that properly authenticated copies of judgments of the courts of sister states "shall have the same full faith and credit in **every court** within this state as they have by law or usage in the courts of such ... state from which they are taken," O.C.G.A. § 24-4-24 (a) (2) (emphasis added). Thus, the court of appeals ignored a Georgia statute as well as the Constitution.

judgment in one state is likewise merged in every other.

Magnolia Petroleum, supra, 320 U.S. at 439.

LUA's motion to dismiss plainly presented the Georgia Court of Appeals with the heart of the constitutional mandate. The motion requested the court of appeals to honor the command of the United States Constitution should it conclude, as it did, that the Virginia judgment only became final during the court of appeals' consideration of the matter, a command which the court of appeals flouted on the specious justification of Georgia procedure alone.[10]

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[10] Ironically, the code section cited by the court of appeals as justifying its refusal to dismiss LUA from this case on the strength of the Virginia judgment permits the dismissal the court refused to grant. "No appeal shall be dismissed or its validity affected for any cause except ... [w]here the questions presented have become moot." O.C.G.A. § 5-6-48 (b) (3). The questions presented by this matter, as to LUA, have become moot by virtue of their final decision by the Virginia courts. *See Heath v. Heath*, 257 Ga. 777, 364 S.E.2d 272 (1988). Thus, the court of appeals ignored another statutory vehicle through which to consider LUA's motion.

Although AWI may assert again that a question concerning the validity of purported assignments of the policies in issue, assumed but not decided in the Virginia judgment, supports the exercise of jurisdiction over LUA by Georgia courts regardless of the vitality of the other issues, the question of AWI's ownership of LUA's policies, which becomes entirely hypothetical without the existence of any outstanding claim for coverage, goes to the merits of LUA's motion to dismiss, which merits the court of appeals refused to reach.

D.
The Georgia Court of Appeals Ignored the U. S. Constitution

The Georgia Court of Appeals, by regarding the section of the Official Code of Georgia outlining aspects of appellate procedure as prescribing the dismissal of LUA's motion to dismiss without reaching its merits, has placed Georgia procedural law above the command of the Constitution and 28 U.S.C. § 1738 as interpreted by this Court since *Mills v. Duryee*, 7 Cranch 481 (1813). The court of appeals has acted as if the debate, long ago decided by *Mills*, still rages over the intent of Congress when it exercised its power under the Full Faith and Credit clause.

Were the Articles of Confederation still this Nation's organic statute, or had the Constitutional Convention not accepted Madison's amendment to the committee report, thereby restoring "shall" to the Full Faith and Credit clause in lieu of "ought to," the federal full faith and credit doctrine may have allowed the court of appeals to choose Georgia procedure over a bedrock precept of American federalism and, having made its choice, refuse to reach the merits of LUA's motion to dismiss the appeal. The debate, however, no longer rages since the proponents of the 1789 *status quo* failed to avert the unifying change worked by the Full Faith and Credit clause of the Constitution as it stands today.

This Court should take this opportunity to explain to the court in Georgia, and to the courts of the several states, that the Constitution requires the appellate courts across the United States to honor final judgments, just as it requires such deference at the trial level. As this Court has characterized the Full Faith and Credit clause:

> [T]he Framers intended to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum. The faith and credit given is not to be niggardly but generous, full. "[L]ocal policy must at times be required to give way, such 'is the price of our federal system.' "

Johnson v. Muelberger, 340 U.S. 581, 584 (1951) (citations omitted).

CONCLUSION

For the reasons stated above, LUA requests this Court issue a writ of *certiorari* to the Court of Appeals of the State of Georgia to review its judgment in this matter as that court failed to apply the Full Faith and Credit clause of the United States Constitution.

Respectfully submitted,

LUMBERMEN'S UNDERWRITING ALLIANCE

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APPENDIX A

ENTERED: July 12, 1990

NOTICE: MOTIONS FOR REHEARING MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 48, March 1, 1985)

2
CARLEY,C.J.
McMURRAY,P.J.,&SOGNIER,J.
JUL 12 1990

In the Court of Appeals of Georgia

A90A0100, A90A0101. ATLANTIC WOOD INDUSTRIES, INC. v. Ca-7, 8
LUMBERMEN'S UNDERWRITING ALLIANCE et al.
A90A0102. RANGER INSURANCE COMPANY v. Ca-9
ATLANTIC WOOD INDUSTRIES, INC.

CARLEY, Chief Judge.

These appeals result from the following set of relevant facts: Appellant-plaintiff Atlantic Wood Industries, Inc. (AWI) was informed by the Environmental Protection Agency (EPA) that its Virginia wood-treatment facility had been determined to be a hazardous waste site under the Comprehensive Environmental Response Compensation Liability Act

(CERCLA). Appellee-defendants Lumbermen's Underwriting Alliance (LUA), Insurance Company of North America (INA), Continental Casualty Company (CCC) and Ranger Insurance Company (RIC) were notified of EPA's determination, but they denied that coverage for the cost of any pollution cleanup measures existed under the respective primary and excess liability policies that they had issued. Thereafter, LUA initiated a declaratory judgment action in Virginia, seeking a declaration that it afforded no coverage to AWI. AWI then initiated the instant action in Georgia, seeking a declaration that it was afforded coverage by LUA, INA, CCC and RIC, and also asserting breach of contract claims for the failure to provide it with a defense to the EPA administrative action. Cross-motions for summary judgment were filed. The trial court granted summary judgment in favor of LUA, INA and CCC, holding that, under the language of the policies that they had issued, there was no coverage. However, the trial court denied summary judgment in favor of RIC, holding that, under the language of its policy, there was coverage. In Case Numbers A90A0100 and A90A0101, AWI appeals from the grant of summary judgment in favor of LUA, INA and CCC. In Case Number A90A0102, RIC cross-appeals from the denial of its motion for summary judgment.

CASE NUMBERS A90A0100 AND A90A0101

1. LUA has moved that these appeals be dismissed as against it, on the ground that its Virginia declaratory judgment action, which was pending at the time AWI initiated the instant Georgia action, has since resulted in a final declaratory judgment that no coverage exists. However, the initial pendency of the Virginia declaratory judgment action did not serve to abate the instant Georgia action. OCGA § 9-2-45. Likewise, the subsequent finality of the Virginia declaratory judgment action is not a ground for dismissing the instant appeals.

OCGA § 5-6-48 (b). Accordingly, LUA's motion to dismiss is denied.

2. The LUA, INA and CCC policies afford liability coverage for "damages," and it is their contention that AWI will incur no liability for "damages" by undertaking any remedial pollution measures that may be mandated by EPA. The issue of whether EPA-mandated pollution cleanup costs constitute "damages" within the coverage of the affected landowner's liability policy has been addressed in other jurisdictions, but not in Georgia. But see Claussen v. Aetna Cas. & Surety Co., 259 Ga. 333 (380 SE2d 686) (1989) (holding that the EPA-mandated costs incurred by the owner of polluted property are within the coverage of a comprehensive general liability policy absent a clear and unambiguous pollution exclusion clause). Although AWI will incur the costs of undertaking the remedial pollution measures in Virginia rather than Georgia, the policies were delivered in Georgia rather than Virginia. Accordingly, the policies are to be construed as Georgia contracts. See General Elec. Credit Corp. v. Home Indem. Co., 168 Ga. App. 344, 350 (2b) (309 SE2d 152) (1983). The instant cases thus require resolution of an issue of first impression in this state: Whether, as a matter of Georgia law, the insured under a liability policy providing coverage for "damages" is afforded coverage for the costs that he incurs in undertaking such remedial pollution measures as are mandated by the EPA.

Several of those jurisdictions which have addressed the issue have held that there is no coverage. See, e.g., Patrons Oxford Mut. Ins. Co. v. Marois, ___ A2d ___ (Me. 1990); Continental Ins. Co. v. Northeastern Pharmaceutical & Chem Co., 842 F2d 977 (8th Cir. 1988) (applying Missouri law); Maryland Cas. Co. v. Armco, Inc., 822 F2d 1348 (4th Circ. 1987) (applying Maryland Law). However, the majority of

jurisdictions have held that there is coverage. See, e.g., Hazen Paper Co. v. USF&G Co., ___ A2d ___ (Mass. 1990); Minnesota Mining & Mfg. Co. v. Travelers Ins. Co., ___ NW2d ___ (Minn. 1990); C. D. Spangler Const. Co. v. Industrial Crankshaft and Engineering Co., Inc., 388 SE2d 557 (N.C. 1990). After giving consideration to the holdings in the above-cited cases and others too numerous to cite, we are in agreement with our sister state of North Carolina that "the better reasoned decisions find that the term 'damages' as used in the coverage provisions of liability policies includes the type of expenditures under consideration." C. D. Spangler Const. Co. v. Industrial Crankshaft and Engineering Co., Inc., supra at 566 (II C). "We rest our decision . . . on the basis that the term 'damages' is not being used in its legal and technical sense in these policies. . . . [I]t is a term easily susceptible to more than one definition. Clearly, there is a specific, technical definition for the word ['damages']: 'payments to third persons when those persons have a legal claim for damages.' [Cit.] If the insurer intended that 'damages' have only this meaning, it should have so indicated in the policy. The insured would then have understood that cleanup costs incurred pursuant to government mandate were not covered, and would have been able to enter into other insuring arrangements. Because such a limiting definition was not included in the policy, we must conclude that the parties did not intend 'damages' to have a specific technical meaning in the insurance policy. Rather, they intended to use its ordinary meaning." C. D. Spangler Const. Co. v. Industrial Crankshaft and Engineering Co., Inc., supra at 568 (II C).

Such a construction of the instant policies is consistent with general principles of Georgia insurance law. "'In construing an insurance policy, "[t]he test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured

would understand them to mean. The policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney." [Cit.] "Where a provision in a policy is susceptible to two or more constructions, the courts will adopt that construction which is most favorable to the insured. [Cit.]" [Cits.]' [Cit.]" United States Fire Ins. Co. v. Hilde, 172 Ga. App. 161, 163 (2) (322 SE2d 285) (1984). Moreover, such a construction of the instant policies is also consistent with the holding in Claussen v. Aetna Cas. & Surety Co., supra, that, in the absence of a clear and unambiguous pollution exclusion clause, the EPA-mandated costs incurred by the owner of polluted property are within the coverage of a comprehensive general liability policy. "Under Georgia law, the risk of any lack of clarity or ambiguity in an insurance contract must be borne by the insurer. [Cit.]" Claussen v. Aetna Cas. & Surety Co., supra at 337 (3).

It follows that the trial court erred in its construction of the instant policies. A layman, having insured himself against liability for "damages," without further definition or limitation, would reasonably conclude that he is protected from financial loss without regard to the legal basis upon which his liability for his loss might technically be premised. There is nothing in the instant policies to indicate an intent to exclude from liability coverage such financial loss as would be incurred by AWI in complying with EPA-mandated pollution measures.

3. Because the trial court's order granted summary judgment on the basis of the non-existence of coverage, it did not otherwise address the issue of the parties' entitlement to summary judgment as to AWI's remaining breach of contract claims for failure to provide a defense. AWI does not enumerate as error the denial of its motion for summary judgment as to those claims, and LUA, INA and CCC have filed no

cross-appeal urging that, should coverage be found to exist, they would nevertheless be entitled to summary judgment as to AWI's claims for breach of contract to defend. LUA, INA and CCC have merely maintained their status as appellees, urging only that the trial court correctly granted them summary judgment as to the non-existence of coverage. Accordingly, our holding in these appeals must necessarily be limited to a reversal of the trial court's grant of summary judgment in favor of LUA, INA and CCC as to the coverage issue and to the trial court's denial of summary judgment in favor of AWI as to that issue. Compare United States Fire Ins. Co., Inc. v. Capital Ford Truck Sales, Inc., 257 Ga. 77 (355 SE2d 428) (1987). The issue of the parties' entitlement to summary judgment as to AWI's claims for breach of contract to defend can only be considered if, subsequent to this appeal, that issue is raised in the trial court and the trial court's ruling in that regard is enumerated as error in a future appeal.

CASE NUMBER A90A0102

4. Although RIC's motion for summary judgment was denied, and the interlocutory provisions of OCGA § 5-6-34 (b) were not followed, RIC is nevertheless entitled to file this direct cross-appeal and enumerate the denial of its motion for summary judgment as error. See Centennial Ins. Co. v. Sandner, Inc., 259 Ga. 317 (380 SE2d 704) (1989).

5. Insofar as the denial of its motion for summary judgment as to the existence of coverage under its excess liability policy is concerned, RIC urges, in effect, an adoption of the same construction of the term "damages" that has been advanced by LUA, INA and CCC. That construction having been rejected in Division 2 of this opinion, it necessarily follows that RIC's excess liability policy does provide coverage insofar as the EPA-mandated pollution cleanup costs incurred by AWI exceed the threshold of the $50,000

limits of AWI's primary liability policy. Accordingly, RIC would be entitled to summary judgment as to the coverage issue only if the undisputed evidence of record showed that AWI's liability for those costs would be less than $50,000. No such showing was made and the trial court, therefore, correctly denied RIC's motion for summary judgment as to the existence of coverage.

6. Because the events for which coverage was afforded had occurred prior to any assignment of RIC policy to AWI, the trial court did not err in failing to grant summary judgment in favor of RIC on the ground that RIC had not consented to such an assignment. See Pacific Ins. Co. v. R. L. Kimsey Cotton Co., Inc., 114 Ga. App. 411, 414 (3) (151 SE2d 541) (1966); Canal Ins. Co. v. Savannah Bank & Trust Co., 181 Ga. App. 520, 522 (4) (352 SE2d 835) (1987).

7. Unlike LUA, INA and CCC, RIC has filed a cross-appeal and does enumerate as error the denial of its motion for summary judgment as to AWI's breach of contract claims for failure to defend. Accordingly, the issue of RIC's entitlement to summary judgment as to these claims for breach of contract to defend must be addressed in the context of this appeal. See United States Fire Ins. Co., Inc. v. Capital Ford Truck Sales, Inc., supra.

Under the terms of the excess liability policy that it issued, RIC had no contractual duty to provide AWI with an initial defense in the EPA administrative action. The exhaustion of the $50,000 limits of AWI's primary liability policy was clearly made a condition precedent to RIC's duty as an excess carrier to undertake a defense of AWI. AWI urges that RIC was nevertheless contractually obligated to undertake the initial defense when the primary liability carrier denied coverage and that RIC's only recourse for having to assume this contractual obligation of the primary carrier would be to bring suit against the primary liability carrier alleging

that carrier's wrongful denial of primary liability coverage to AWI. Although AWI's primary liability carrier had denied coverage, that carrier was named as an original party-defendant in this action and the record shows that, as against that carrier, AWI has settled its claims for declaratory judgment and breach of contract to defend. Accordingly, AWI is estopped to urge that RIC had the contractual duty to undertake the initial defense and that it would be relegated to asserting a claim over against the primary liability carrier for the wrongful denial of primary coverage to AWI. Having undertaken to enforce its own claims for coverage and breach of contract to defend against its primary liability carrier, AWI would have a viable claim against RIC for breach of contract to defend if, but only if, the $50,000 limits of AWI's primary liability policy had been exceeded. See generally United States Fire Ins. Co., Inc. v. Capital Ford Truck Sales, Inc., supra.

In support of its motion for summary judgment, RIC introduced evidence showing that it has not received any notice from AWI that the $50,000 limits of AWI's primary liability policy have been exceeded. In opposition to RIC's motion, AWI neither introduced any evidence to show that such notice had ever been given to RIC nor did it disclose the terms upon which AWI had settled with its primary liability carrier, apparently because the terms of that settlement are deemed by AWI to be confidential. Since the undisclosed terms of the settlement agreement are accessible to AWI but not to RIC, a presumption would arise that those terms "would, if adduced, be unfavorable to [AWI]. [Cits.] 'When a motion for summary judgment is made and supported . . ., an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. . . .' [Cit.]" Jahncke Service, Inc. v. DOT, 172 Ga. App. 215, 219 (2) (322

SE2d 505) (1984). Accordingly, the evidence of record not only demonstrates that RIC has never been notified of the satisfaction of the condition precedent to its contractual duty as the excess carrier to provide a defense to AWI, but said evidence also shows an unrebutted presumption that such condition precedent has not been satisfied because, under the undisclosed terms of the settlement agreement, AWI has presumably settled with its primary liability carrier for less than the $50,000 limits. It follows that the trial court erred in denying RIC's motion for summary judgment as to AWI's claim for breach of contract to defend.

8. The denial of RIC's motion for summary judgment as to the non-existence of coverage under the excess liability policy that it issued is affirmed. The denial of RIC's motion for summary judgment as to AWI's claims for breach of contract to defend is reversed.

Judgments reversed in Cases Number A90A0100 and A90A0101. Judgment affirmed in part and reversed in part in Case Number A90A0102. McMurray, P. J., and Sognier, J., concur.

ENTERED: July 25, 1990

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta,

July 25, 1990

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A90A0100. ATLANTIC WOOD INDUSTRIES, INC. v. LUMBERMEN'S UNDERWRITING ALLIANCE ET AL

A90A0101. ATLANTIC WOOD INDUSTRIES, INC. v. LUMBERMEN'S UNDERWRITING ALLIANCE ET AL

A90A0102. RANGER INSURANCE COMPANY v. ATLANTIC WOOD INDUSTRIES, INC.

Upon consideration of the motions for rehearing filed on behalf of Atlantic Wood Industries, Inc., Ranger Insurance Company, Lumbermen's Underwriting Allance, and Insurance Company of North America and Continental Casualty Company in the above styled cases, it is hereby ordered that said motions for rehearing are hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta [JUL 25,1990]
I certify that the above is a true

extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/Victoria McLaughlin
Clerk.

ENTERED: September 4, 1990

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: SEPTEMBER 04, 1990

Ms. Mary Louise Kramer
Sands, Anderson, Marks & Miller
P.O. Box 1998
Richmond Va 23216

Case No. S90C1516

ATLANTIC WOOD INDUSTRIES, INC. V. LUMBERMEN'S UNDERWRITING ALLIANCE ET AL.

COURT OF APPEALS CASE NO. A90A0100 A90A0101 A90A0102

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Weltner, J., not participating.

Very truly yours,

JOLINE B. WILLIAMS,
Clerk

ENTERED: May 30, 1989

IN THE SUPERIOR COURT,
EASTERN JUDICIAL CIRCUIT, GEORGIA

Atlantic Wood Industries, Inc., Plaintiff,	*	CA#X87-1019-4
v.	*	
Argonaut Insurance Company, Continental Casualty Company, Insurance Company of North America, Lumbermen's Underwriting Alliance, and Ranger Insurance Company, Defendants.	*	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS LUMBERMEN'S UNDERWRITING ALLIANCE, INSURANCE COMPANY OF NORTH AMERICA, AND CONTINENTAL CASUALTY COMPANY
AND
ORDER ON MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF

The MOTIONS FOR SUMMARY JUDGMENT of defendants Lumbermen's Underwriting Alliance (LUA), Insurance Company of North America (INA), and Continental Casualty Company (Continental) having been heard and considered, the same are hereby GRANTED.

The MOTION FOR SUMMARY JUDGMENT of plaintiff Atlantic Wood Industries, Inc. (AWI) having been heard and considered, the same is hereby DENIED.

The present cross motions for summary judgment require this Court to ascertain first whether the term "damages" as used in the comprehensive general liability policies, property policies, and excess liability policies issued by the defendant insurers includes environmental response costs assumed by the plaintiff in compliance with §107(a)(4)(A) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 94 Stat. 2796, 42 USC §9607(a)(4)(A), and second whether the terms of the defendant insurers' policies obligate them to defend the plaintiff in a suit brought against the plaintiff by the United States Environmental Protection Agency pursuant to CERCLA.

Initially at issue is the use of the term "damages" in two comprehensive general liability policies, Nos. 211328 and 211514, issued by defendant LUA to AWI's predecessor-in-interest. These two policies together provided the named insured with coverage for a period of time extending from February 1, 1978 to February 1, 1980. During this two year interval the insuring agreement of each policy obligated defendant LUA to indemnify the insured as follows:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies caused by an occurrence . . .

LUA also issued certain property policies to AWI's predecessor-in-interest two of which, Nos. 168740 and 182999, together required the insurer to furnish coverage to the insured for a total of five years from October 1, 1978 to October 1, 1983. Each property policy also required the insurer to indemnify the insured as follows:

> . . . the Company agrees with the named

> Insured to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of injury to or destruction of such property, including the loss of use thereof, caused by accident and arising out of peril(s) insured against . . .

The LUA comprehensive general liability policies and property policies were identical inasmuch as each of these policies limited the nature of the sums for which the insurer will indemnify the insured to ". . . all sums . . .which the Insured shall become legally obligated to pay as damages . . ."

Similarly at issue is the use of the term "damages" in certain excess liability policies issued to AWI's predecessor-in-interest by defendants INA and Continental. The four policies provided by INA, Nos. XBC 151-866, XBC 152-356, XBC 153-189 and XBC 154-079, furnished coverage to the insured for a four year interval extending from February 1, 1980 to February 1, 1984. Continental issued three excess liability policies to the insured, Nos. RDU 993-8493, RDU 804-6073, and RDU 976-0488, which together provided coverage for a nine year period beginning on August 22, 1966 and ending on August 26, 1975. The insuring agreement of each of the four INA policies required the insurer to furnish coverage for a certain sum which the insurer was legally obligated to pay as damages:

> INA will indemnify the Insured for ultimate net loss in excess of the retained limit hereinafter stated which the insured shall become legally obligated to pay as damages because of
>
> A. personal injury, or
> B. property damage or
> C. advertising injury

> to which this insurance applies caused by an occurrence . . .

The indemnity agreement contained in each of the Continental policies was parallel to that found in the INA policies:

> The company will indemnify the insured for loss in excess of the total applicable limits of liability of underlying insurance stated in the schedule.
>
> DEFINITIONS
>
> "loss" means . . . the sums paid as damages in settlement of a claim or in satisfaction of a judgment for which the insured is legally liable, after making deductions for all recoveries, salvages, and other insurances, (whether recoverable or not) other than the underlying insurance and excess insurance purchased specifically to be in excess of this policy.
>
> "underlying insurance" means . . . the insurance policies listed in the schedule of underlying insurance including any renewal or replacement of such contracts, and also includes the insurance policies not listed in the schedule of underlying insurance for which notice has been given . .

Each of the policies provided to AWI's predecessor-in-interest by the defendant insurers limited the respective insurer's financial obligation to sums owed as damages. Consequently this Court must first focus its inquiry on the extent to which the term "damages" has a plain and readily understood meaning.

"Damages" as defined by statute in Georgia are sums awarded as compensation for injury. OCGA §51-12-4. This statutory definition, however, must be construed in conjunction with OCGA §§51-12-5, 6, Westview Cemetery, Inc. v. Blancard, 234 Ga. 540, 216,

S.E. 2d 776 (1975), both of which provisions limit the language of OCGA §51-12-4:

> §51-12-5:
>
> (a) In a tort action in which there are aggravating circumstances, in either the act or the intention, the injury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.
>
> §51-12-6
>
> In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened conscience of impartial jurors.

Not only are damages awarded as compensation for injury, but as a result of such an injury must also stem from the tortious action of a wrongdoer or tortfeasor; the injury for which compensation is sought must be in essence:

> . . . one's disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract had established between the parties. [Cit.] Postal Telegraph-Cable Co. v. Kaler, 65 Ga. App. 641, 16 S.E. 77 (1941).

See OCGA §51-1-1. Consequently the term "damages" in Georgia connotes an award given as compensation for a specific type of injury; damages are given as compensation for tortious injury. Kesler v. Veal, 182 Ga. App. 444, 356 S.E. 2d 254 (1987) modified 257 Ga. 677, 362 S.E.2d 214 (1987). This limited construction of

the term "damages" is consistent with the construction given it by the statutory scheme of CERCLA §107(a)(4), 42 USC §9607(a)(4), Maryland Cas. Co. v. Armco, Inc., 822 F. 2d 1348 (4th Cir. 1987); Mraz v. Canadian Universal Ins. Co. 804 F. 2d 1325 (4th Cir. 1986). Both Georgia law and CERCLA encompass the notion of a wrongdoer in their respective statutory constructions of the term "damages" Under CERCLA, however, damages stem from an injury to, a destruction of, or a loss of natural resources, 42 USC §§9601(6) 9607(a)(4)(C), occasioned by any one or more of four entities specified by the provision of §9607(a)(1)-(4).

> §9607. Liability
> (a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section
>
> (1) the owner and operation of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposes of,
>
> (3) any person who by contract, agreement or otherwise arranged for disposal and treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to

> disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened relief, which causes the incurrence of response costs, of a hazardous substance shall be liable for
>
> (A) all costs of removal or remedial action incurred by the United States Government or a state or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 104(i) [42 USC §9604(i)]. CERCLA §107a), 42 USC 9607(a).

Each of these four entities is akin to the wrongdoer inherent in the construction accorded the term "damages" by Georgia law.

The United States Environmental Protection Agency nevertheless did not bring suit against the plaintiff pursuant to CERCLA's "damages" provision but instead initiated action against AWI as a "wrongdoer" pursuant to CERCLA §107(a)(4)(A), 42 USC §9607(a)(4)(A). This particular provision permits recovery by the government of sums expended in the

removal of hazardous substances from the environment; it does not provide for compensation for injury to or destruction of the environment. See USC §9607(a)(4)(A). Although the government in its suit sought reimbursement of the costs of certain investigative and remedial measures, it did not allege nor did it seek compensation for an injury to natural resources. Such an injury to the environment, however, is the only basis for "damages" under CERCLA. The term "damages" is not synonymous with nor does it include the removal costs specified by [107(a)(4)(A) of CERCLA, 42 USC [9607(a)(4)(A). Were removal or response costs synonymous with or encompassed by the term "damages", logic indicates that the act would not differentiate between the two.

Those insurance policies in the present action which do employ the term "damages" are contracts with the same attributes and requirements of any contract. As such the policies are also subject to the rules governing the construction of contract. Grange Mut. Cas. v. King, 174 Ga. App. 716, 331 S.E. 2d 41 (1985). In the interpretation of a contract such as an insurance policy words generally are to be accorded their plain, ordinary meaning. OCGA §13-2-2-(2); Johnson v. United States Fidelity & Guar. Co., 93 Ga. App. 336, 91, S.E. 2d 779 (1956). This meaning is to be supplied by dictionaries. Henderson v. Henderson, 152 Ga. App. 846, 264 S.E. 2d 299 (1979). Plaintiff AWI contends that the consistent statutory constructions of the term "damages" provided by Georgia law and CERCLA are too technical and narrow to constitute the plain, ordinary signification of the word. Consequently plaintiff AWI interprets the plain meaning of the word "damages" in accordance with the dictionary definition of the word "damage" which includes any loss due to injury. Plaintiff AWI as a result construes the term "damages" to include any or all sums for which a party is liable. Both

Webster's Third New International Dictionary (1981) and Black's Law Dictionary (1979) however, distinguish between the term "damage" and "damages". Within its definition of "damage", Black's Law Dictionary distinguishes between the two terms:

> The word [damage] is to be distinguished from its plural "damages", which means a compensation in money for a loss or damage. Black's Law Dictionary (1979).

Yet the term "damages" is defined by Black's to be:

> A pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property or rights through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another. Black's supra.

The notion of compensation for violation of a legal right is also inherent in the definition of "damages" provided by Webster's Third New International Dictionary (1981):

> [damages are] the estimated reparation in money for detriment or injury sustained: compensation or satisfaction imposed by law for a wrong or injury caused by a violation of a legal right.

The dictionary definitions of the word "damages" illustrate the technical nature of the word itself; "damages" is a term of art peculiar to the legal profession and as such to be accorded it peculiar meaning:

> (2) Words generally bear their usual and common signification; but technical words, words of art, or

> words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning. The local usage or understanding of a word may be proved in order to arrive at the meaning intended by the parties. OCGA §13-2-2(2).

The "damages" as used in the defendant insurers' insuring agreements connotes a pecuniary compensation awarded an individual for another's violation of a legal duty or right. Since CERCLA response costs are not awarded as compensation for such a violation or injury, but are instead intended to reimburse the government for funds expended in removing hazardous sustances from the environment, these costs are not included by term "damages". None of the three defendant insurers is obligated, as a result, to indemnify the insured for the removal or remedial costs assumed by the insured in compliance with §107(a)(4)(A) of CERCLA, 42 USC §9607(a)(4)(A).

Plaintiff AWI nevertheless argues that should the defendants prove to have no duty to indemnify the insured for CERCLA response costs, the duty to defend assumed by each insurer in its respective policie(s) is broader than the duty to indemnify the insured for removal or response costs. The comprehensive general liability policies negotiated between LUA and the insured provided that

> . . . the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent . . .

The LUA property policies issued to the insured obligated the insurer to:

> . . . defend any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent . . .

Both of the excess liability carriers, INA and Continental, were similarly obligated to the insured to defend certain suits brought against the insured. The language of the INA policies required the insurer to defend the insured such that:

> (1) With respect to any personal injury, property damage or advertising injury not within the terms of the coverage of underlying insurance but within the terms of coverage of this insurance; or
> (2) If limits of liability of the underlying insurance are exhausted because of personal injury, property damage or advertising injury during the period of this policy
> INA will
>
> > (a) have the right and duty to defend any suit against the Insured seeking damages on account of such personal injury, property damage or advertising injury, even if any of the allegations of the suit are groundless, false, or fraudulent . . .

Likewise the language outlining the insurer's duty to defend in the Continental policies stated that:

> The company with respect to an occurrence not covered in whole or in part by underlying insurance or to which there is no other insurance in anyway applicable, shall have the right and duty to defend any suit against the insured seeking damages on account of such personal

> injury, property damage, or advertising injury, even if any of the allegations of the suit are groundless, false, or fraudulent . . .

The duty to defend as defined in each of these policies extends only to suits brought against the Insured which seek damages. The underlying suit brought against the plaintiff, however, as previously discussed is not one for damages but is instead one for reimbursement and as such does not include the idea of violation of a right, injury, or wrongdoing. The present policies consequently define the duty to defend coterminously with the duty to indemnify the insured for damages. To the extent that the term damages includes or excludes response costs, so too will the duty to defend include or exclude the suit brought against the insured by the Environmental Protection Agency. Since the term "damages" does not obligate the insurers to indemnify the insured for response costs assumed by the plaintiff in compliance with §107(a)(4)(A) of CERCLA, 42 USC §9607(a)(4)(A), it also does not require the three defendant insurers to defend the suit brought against the plaintiff by the United States Environmental Protection Agency.

Defendants Lumbermen's Underwriting Alliance, Insurance Company of North America, and Continental Casualty Company have no duty to indemnify nor to defend the plaintiff Atlantic Wood Industries, Inc. in the underlying suit brought against the plaintiff by the United States Environmental Protection Agency. The MOTIONS FOR SUMMARY JUDGMENT of defendants Lumbermen's Underwriting Alliance, Insurance Company of North America, and Continental Casualty Company are hereby GRANTED. The MOTION FOR SUMMARY JUDGMENT of plaintiff Atlantic Wood Industries, Inc. is hereby DENIED.

SO ORDERED THIS 30TH DAY OF MAY, 1989.

/s/PERRY BRANNEN, JR.
Perry Brannen, Jr., Judge
Superior Court, EJC, Ga.

cc: James M. Thomas, Esq.
S. Vernon Priddy, Esq.
John M. Tatum, Esq.
John H. Harwood, II, Esq.
Joseph H. Barrow, Esq.
James W. Greene, Esq.
Arnold C. Young, Esq.
Gerald P. Norton, Esq.
Paul W. Painter, Jr., Esq.
Benny C. Priest, Esq.

APPENDIX B

VIRGINIA: **ENTERED: August 14, 1989**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 14th *day of* August, 1989.

Atlantic Wood Industries, Inc., Appellant,

against Record No. 890559
Circuit Court No. 86-L-350

Lumbermen's Underwriting Alliance, Appellee.

From the Circuit Court of Henrico County

Upon consideration of the record, the brief of the appellant, and the argument of counsel, the Court is of the opinion that the petition for appeal should be refused.

The trial court granted plaintiff summary judgment on all the issues, holding, "[f]or the purposes of this order, the court assumes but does not decide that the policies issued by plaintiff, and at issue herein, were validly assigned to defendant." Even if this Court holds that the trial court erred in its refusal to reach the assignment issue, since the defendant failed to raise the summary judgment ruling as an assignment of error, the trial court's ruling is dispositive.

A Copy,

Teste:
David B. Beach, Clerk

By:
/s/ John T. Tucker, IV
Deputy Clerk

ENTERED: September 22, 1989

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 22nd *day of* September, 1989.

Atlantic Wood Industries, Inc., Appellant,

against Record No. 890559
Circuit Court No. 86-L-350

Lumbermen's Underwriting Alliance, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 14th day of August, 1989 and grant a rehearing thereof, it is ordered that a rehearing be granted, the said judgment refusing the petition for appeal be reversed and set aside, and the following judgment be entered in lieu thereof:

> Upon consideration of the record, the brief of the appellant, and the argument of counsel, the Court is of the opinion that the petition for appeal should be refused.
>
> The trial court entered on order holding, "[p]laintiff's Motion for Summary Judgment on all other issues is hereby GRANTED". Among the issues decided by this holding is the question whether a suit, within the ambit of the policy provisions, had been filed, triggering appellee's duty to defend. The trial court's holding on the summary judgment motion decides this question

adversely to the appellant. Since appellant failed to raise this issue as an assignment of error, the trial court's ruling is dispositive.

On further consideration whereof, the appellant's motion for remand is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

ENTERED: February 10, 1989

VIRGINIA:

IN THE CIRCUIT COURT OF THE
COUNTY OF HENRICO

LUMBERMEN'S UNDERWRITING
ALLIANCE, Plaintiff,

v. Law No. 86L350

ATLANTIC WOOD INDUSTRIES, INC., Defendant.

FINAL JUDGMENT ORDER

This matter comes before the Court on the parties' cross-motions for summary judgment. For the reasons stated in the letter ruling of this Court dated October 7, 1988, and the rulings from the bench on February 10, 1989, the court ORDERS and ADJUDGES as follows:

1. For the purposes of this order, the court assumes but does not decide that the policies issued by plaintiff, and at issue herein, were validly assigned to defendant.
2. Plaintiff's Motion for Summary Judgment on all other issues is hereby GRANTED, and defendant's Motion for Summary Judgment is hereby DENIED.

It is so ORDERED, to which action of the court the defendant objects. The Clerk is directed to place these papers among the ended matters and send a copy of this Order to all counsel of record.

ENTER: 2/10/89

/s/ James E. Kulp
Judge

/s/ Mary Louise Kramer p.q.

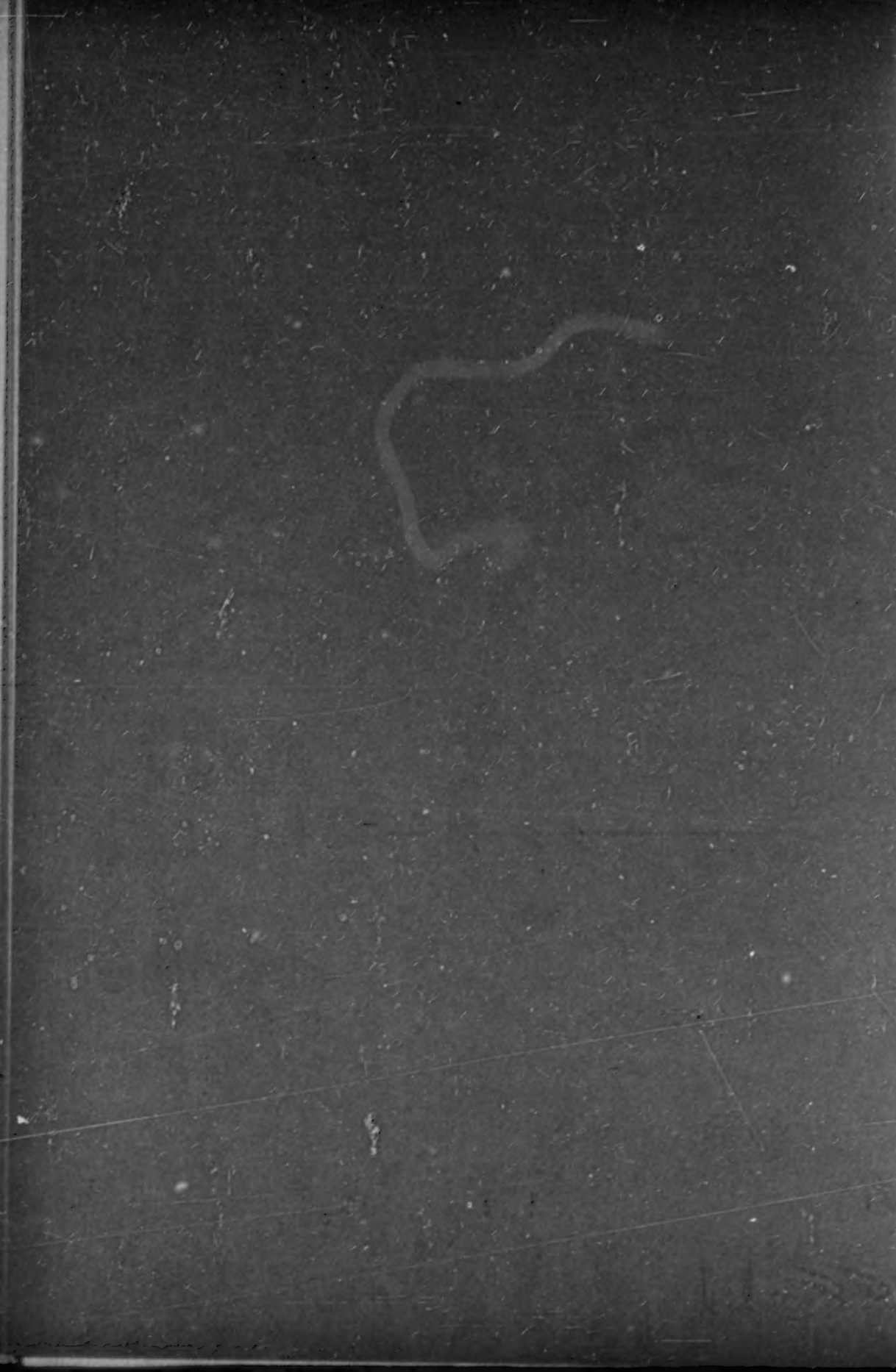
A Copy Teste:
Margaret B. Baker,
Clerk

/s/ Trina McElligott
Deputy Clerk

/s/ David O. Ledbetter p.d.

APPENDIX C*

* Exhibits or addenda shown in the documents set forth in Appendix C as attached thereto are omitted from the version printed in the Appendix.



IN THE COURT OF APPEALS
STATE OF GEORGIA

ATLANTIC WOOD INDUSTRIES, INC.,	)	
	)	Appeal From
Appellant,	)	Superior Court
	)	of Chatham
	)	County
v.	)	No. X87-
	)	1019-B
LUMBERMEN'S UNDERWRITING ALLIANCE, CONTINENTAL CASUALTY COMPANY, INSURANCE COMPANY OF NORTH AMERICA and RANGER INSURANCE COMPANY,	)	Appeal Nos. A90A0100 A90A0101
Appellees.	)	

LUMBERMEN'S UNDERWRITING ALLIANCE'S
MOTION TO DISMISS

The appellee, Lumbermen's Underwriting Alliance ("LUA"), by counsel, respectfully requests that this appeal be dismissed with prejudice as to LUA upon the doctrines of res judicata and estoppel by judgment, all as more fully stated in the accompanying memorandum.

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

/s/ Frank B. Miller, III (by express permission CDH)
Frank B. Miller, III
Mary Louise Kramer
S. Vernon Priddy, III
SANDS, ANDERSON, MARKS & MILLER
801 East Main Street, Suite 1400
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/s/ C. Dale Harman
C. Dale Harman
Perry A. Phillips
HARMAN, OWEN, SAUNDERS & SWEENEY
1900 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-2600

IN THE COURT OF APPEALS
STATE OF GEORGIA

ATLANTIC WOOD INDUSTRIES, INC.,	)
Appellant,	) Appeal From) Superior Court) of Chatham
v.	) County) No. X87) -1019-B
LUMBERMEN'S UNDERWRITING ALLIANCE, CONTINENTAL CASUALTY COMPANY, INSURANCE COMPANY OF NORTH AMERICA and RANGER INSURANCE COMPANY,	) Appeal Nos.) A90A0100) A90A0101
Appellees.	)

MEMORANDUM OF LUMBERMEN'S UNDERWRITING ALLIANCE IN SUPPORT OF ITS MOTION TO DISMISS

The appellee, Lumbermen's Underwriting Alliance ("LUA"), by counsel, submits this Memorandum in Support of its Motion to Dismiss based on the doctrines of res judicata and estoppel by judgment. For the reasons stated herein, this action must be dismissed with prejudice as to LUA.

I.
SUMMARY OF PERTINENT FACTS AND MATERIAL PROCEEDINGS

Since September, 1987, when LUA filed its Motion for Declaratory Judgment in the Circuit Court of Henrico County, Virginia,[1] it has been embroiled in litigation with Atlantic Wood Industries, Inc. ("AWI") concerning LUA's duty to defend AWI in its dispute with the U.S. Environmental Protection Agency over environmental contamination at AWI's Portsmouth, Virginia wood treatment facility. LUA subsequently filed its Amended Motion for Declaratory Judgment (attached as Exhibit A)[2] upon which it ultimately moved for summary judgment. AWI filed an Answer and Grounds of Defense to [LUA's] Amended Motion for Declaratory Judgment and Counterclaim (attached as Exhibit B) in the Virginia action. LUA's Amended

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1 The declaratory judgment action in the Circuit Court of Henrico County ("Henrico Circuit Court") was styled Lumbermen's Underwriting Alliance v. Atlantic Wood Industries, Inc., bearing Law Number 86-L-350 ("the Virginia action").

2 Authenticated copies of LUA's Amended Motion For Declaratory Judgment, AWI's Answer to Amended Motion For Declaratory Judgment and Counterclaim, LUA's Amended Motion For Summary Judgment and AWI's Cross-Motion For Summary Judgment in the Virginia action (Exhibits A - D) are being filed by LUA's counsel in Richmond, Sands, Anderson, Marks & Miller under separate cover. The exhibits are being filed on December 12, 1989 by mailing them by registered or certified mail pursuant to Rule 4 of the Court of Appeals.

Motion for Summary Judgment (attached as Exhibit C) in the Virginia action, filed on May 23, 1988, included the same issues presented before this Court on the parties' cross-motions for summary judgment. AWI filed a cross-motion for summary judgment in the Virginia action (attached as Exhibit D) as it has also done in this action. These pleadings presented the Henrico Circuit Court with a broad range of issues including all the issues raised in this action.

Henrico Circuit Court ruled in favor of LUA as to all issues except the assignment issue, which it chose not to address in the Judgment Order of February 10, 1989 entered by Judge Kulp. (An attested copy of the Final Judgment Order is attached as Exhibit E.) Pursuant to Rule 1:1, Rules of the Supreme Court of Virginia,[3] this Judgment Order became final on March 4, 1989.

AWI noted its appeal to the Supreme Court of Virginia on March 1, 1989. On May 10, 1989, AWI filed its Petition for Appeal.[4] On August 14, 1989, the Supreme Court of Virginia denied AWI's Petition for Appeal. (An attested copy of the August 14, 1989 Order is attached as Exhibit F.) AWI thereafter filed in the Supreme Court a Petition for Rehearing and a Motion for Remand to the trial court. By Order of September 22, 1989, the Supreme Court of Virginia vacated its initial order, reheard the matter, again

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[3] A copy of Rule 1:1, as well as all other Virginia authority cited herein, is attached hereto in an Addendum following the Exhibits.

[4] No appeal as a matter of right exists in Virginia for civil cases of this character. See Rules 5:9, 5:17 - 5:20, Rules of the Supreme Court of Virginia.

refused AWI's Petition for Appeal and denied the Motion for Remand to the trial court. (An attested copy of the September 22, 1989 Order is attached as Exhibit G.)

LUA instituted the Virginia action before AWI filed its action in Georgia. LUA moved for summary judgment in Virginia. LUA diligently pursued the declaratory judgment in the Virginia action. The Supreme Court of Virginia has refused AWI's appeal. AWI has exhausted the appellate procedure in Virginia. LUA should not now be required to re-litigate the exact same issues against AWI in another court when a court of competent jurisdiction has ruled on these issues and granted summary judgment in favor of LUA.

II.
ARGUMENT
A.
AUTHORITY FOR MOTION

LUA presents its Motion to Dismiss to this Court to permit it to consider the judgment of the Supreme Court of Virginia rendered following the appeal of this matter from the Superior Court of Chatham County. This Court, in Hudgens v. Local 315 Retail, Wholesale, And Department Store Union, 133 Ga. App. 329, 210 S.E. 821 (1974), has considered a motion to dismiss presenting, similarly, a United States Supreme Court opinion.

Additionally, this motion is in the nature of a plea puis darrien continuance, a pleading long-recognized in Georgia as a vehicle to present defenses which arose after institution of the suit, such as pleas of res judicata, to the attention of a court. See Teper v. Weiss, 115 Ga. App. 621, 155 S.E.2d 730 (1967).

B.

1.

THE ISSUES PRESENTLY BEFORE THIS COURT, HAVING BEEN DECIDED IN FAVOR OF LUA IN THE VIRGINIA ACTION PURSUANT TO A VIRGINIA FINAL JUDGMENT ORDER ARE RES JUDICATA AS BETWEEN LUA AND AWI

The Georgia Code incorporates the doctrine of res judicata:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside.

O.C.G.A. § 9-12-40. A party must meet three prerequisites to apply the doctrine of res judicata: 1) identity of the parties; 2) identity of the cause of action; and, 3) prior adjudication by a court of competent jurisdiction. McCracken v. City of College Park, ___ Ga. ___, 384 S.E.2d 648 (1989); State Bar of Ga. v. Beazley, 256 Ga. 561, 350 S.E.2d 422, (1986).

LUA and AWI, the parties to the Virginia action, are, without question, both parties to this action. Identity of parties does not mean that all of the parties on the respective sides of the litigation in the two cases shall have been identical; it means only that those who invoke the defense and those against whom they invoked it must be the same. Firestone Tire and Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Also, without question, the Virginia action involved the same issues (and more) that confront this Court. A comparison of AWI's Amended Motion for Declaratory Judgment filed in this action and its Counterclaim filed in the Virginia action (even ignoring LUA's pleading) demonstrates the identity of issues. LUA and AWI each took the opportunity to litigate the merits of the issues raised in this action in the Virginia action. All of the issues dispositive of this case as to LUA have been decided in its favor by a court of competent jurisdiction in Virginia. (See Order granting summary judgment on all issues and the Supreme Court of Virginia's Orders denying AWI's appeal, Exhibits E, F and G.) LUA has satisfied the three criteria to invoke the doctrine of res judicata.

While AWI may argue that there is no identity of the causes of action, that argument is without merit. The Supreme Court of Georgia, as recently as October 19, 1989, has held that a party meets the second prerequisite of the doctrine of res judicata

> so long as a party pleads but one wrong in respect to the same transaction, the cause of action is the same, and it makes no difference that the remedies sought to be applied under different procedures growing out of the same wrong may be different.

McCracken v. City of College Park, ___ Ga. ___, 384 S.E.2d 648, 649 quoting Hamlin v. Johns, 41 Ga. App. 91 (2), 151 S.E. 815 (1929). The mere fact that the Georgia action joins a claim for damages with a request for declaratory relief, whereas the Virginia action was one purely for declaratory relief, does not prevent invocation of the doctrine of res judicata. AWI pled the same wrong in respect to the same transaction, namely the denial of insurance coverage arising out of

environmental contamination at AWI's Portsmouth, Virginia facility. A single cause of action with several elements of damage admits but one action, where there is an identity of subject matter and of parties. Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796 (1980). A plaintiff is not permitted to split his single cause of action to seek in successive litigation the enforcement of first one remedy and then a second. Id. AWI cannot merely include a breach of contract count with a declaratory judgment count to defeat the res judicata effect of the Virginia judgment.

Full faith and credit requires this Court to enforce the judgment of the Virginia court. U.S. Const. Art. IV, §1. As the Virginia pleadings indicate, LUA received summary judgment on a full array of issues including the "damages" issue before this Court on appeal. The judgment of the Virginia court must be accorded full faith and credit. Boyer v. Korsunsky, Frank, Erickson Architects, Inc., 191 Ga. App. 549, 382 S.E.2d 362 (1989); Tandy Computer Leasing v. Bennett's Service Company, 188 Ga. App. 594, 373 S.E.2d 647 (1988). Properly authenticated copies of judgments of the courts of sister states "shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state ... from which they are taken." O.C.G.A. § 24-7-24(a)(2) (emphasis added).

Virginia accords the final judgments of its courts res judicata effect. In other words, a valid personal judgment on the merits in favor of a party bars relitigations of the same cause of action, or any part thereof which could have been litigated, between the parties. Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974). As should be expected, the Virginia Supreme Court accords its adjudications of matters the same finality of trial courts. See Miller v. Turner, 111 Va. 341, 68 S.E. 1007 (1910).

2.

COLLATERAL ESTOPPEL BY JUDGMENT BARS ANY FURTHER ACTION AS BETWEEN LUA AND AWI

As noted, LUA moved for summary judgment against AWI in the Virginia action on an array of issues including the "damages" issue now before this Court. The Virginia action disposed of that issue adversely to AWI. Even assuming, arguendo, that this Court finds that the cause of action in Georgia differs from the cause of action in Virginia, the doctrine of estoppel by judgment would still apply. As to the construction of the word "damages" in the insurance policy, that issue was directly decided by the Virginia courts.

> Under a plea of estoppel by judgment, sometimes referred to as 'collateral estoppel' or as 'estoppel by verdict,' 'the former adjudication is a bar if the same issues were litigated by the parties or their privies in the previous action, though it is not essential that it be upon the same cause of action.'

Greene v. Transport Insurance Company, 169 Ga. App. 504, ___, 313 S.E.2d 761, 762 (1984) (emphasis in original) quoting Smith v. Wood, 115 Ga. App. 265 (1), 154 S.E.2d 646 (1967). There being no further right to appellate review in Virginia, the Virginia judgment is final and estoppel by judgment applies to prevent this Court from taking any action inconsistent with the

Virginia judgment.[5]

CONCLUSION

For the foregoing reasons, LUA respectfully requests that this Court dismiss with prejudice AWI's action as to it.

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

/s/ Frank B. Miller, III (by express permission CDH)
Frank B. Miller, III
Mary Louise Kramer
S. Vernon Priddy, III
SANDS, ANDERSON, MARKS & MILLER
801 East Main Street, Suite 1400
P. O. Box 1998
Richmond, Virginia 23216-1998
(804) 648-1636

---

[5] AWI, in a footnote in its opening brief, advised this court that proceedings concerning the appeal are still pending in Virginia. As the attested copies from the Supreme Court of Virginia demonstrate, the appeal is over. AWI has filed a Motion for a Corrected Order in the trial court; in response LUA has filed a Petition for Writ of Prohibition in the Supreme Court of Virginia on the grounds that the trial court now lacks any jurisdiction. The Supreme Court of Virginia has not acted upon LUA's Petition. Needless to say, however, a Virginia trial court utterly lacks the power to vacate an order of the Virginia Supreme Court.

/s/ C. Dale Harman
C. Dale Harman
Perry A. Phillips
HARMAN, OWEN, SAUNDERS & SWEENEY
1900 Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-2600

CERTIFICATE OF SERVICE

This is to certify that I have this 12th day of December, 1989, provided all counsel with a copy of the foregoing Motion to Dismiss and Memorandum by placing the same in the United States mail, with adequate postage thereon, properly addressed to:

Arnold C. Young, Esquire
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Drew, Eckl & Farnham
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HARMAN, OWEN, SAUNDERS
& SWEENEY P.C.

/s/ Perry A. Phillips
Perry A. Phillips

APPENDIX D*

* Exhibits or addenda shown in the documents set forth in Appendix D as attached thereto are omitted from the version printed in the Appendix.

IN THE
SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

ATLANTIC WOOD INDUSTRIES,	)	
	)	
Plaintiff,	)	Case No. 87-10198
v.	)	
	)	
ARGONAUT INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, INSURANCE COMPANY OF NORTH AMERICA, LUMBERMEN'S UNDERWRITING ALLIANCE, and RANGER INSURANCE COMPANY,	)	
Defendants.	)	

MOTION FOR PROTECTIVE ORDER

Lumbermen's Underwriting Alliance ("LUA"), by counsel, respectfully moves this Court for entry of a Protective Order as more particularly set forth below:

1. In September, 1987, Lumbermen's Underwriting Alliance filed a Motion for a Declaratory Judgment in the Circuit Court of Henrico County, Virginia styled Lumbermen's Underwriting Alliance v. Atlantic Wood Industries, Inc., bearing Law Number 86-L-350 ("the Henrico Action"). In the Henrico Action, the Court was

presented with a broad range of issues including the same "duty to defend" issues raised in this action.

2. LUA filed a Motion for Summary Judgment in the Henrico Action in November, 1987, on the following issues:

1) Is AWI an insured under or assignee of LUA's policies?

2) Does LUA have a duty to defend AWI under the CGL policies?

3) Does LUA have a duty to indemnify AWI for its response costs under the CGL policies?

4) Does LUA have a duty to defend AWI under the property policies?

5) Does LUA have a duty to indemnify AWI under the property policies?

A copy of LUA's motion is attached as Exhibit A.

3. AWI filed a Cross Motion for Summary Judgment in the Henrico Action in June, 1988.

4. Counsel for LUA and counsel for AWI orally argued their respective Motions for Summary Judgment before the Honorable Judge James E. Kulp of the Circuit Court of Henrico County.

5. Thereafter, the Henrico Circuit Court ruled in favor of LUA as to all issues except the assignment issue, which it chose not to address. A Final Judgment Order was entered by the Henrico Court on February 10, 1989. A copy of the Final Judgment Order is attached hereto as Exhibit B.

6. The United States Constitution requires that "Full Faith and Credit be given in each State to ... judicial proceedings of every other State." U.S. Const., Art. IV, Sec. 1.

7. Pursuant to Rule 1:1, Rules of the Supreme Court of Virginia, this Judgment Order will become final on March 4, 1989. Once the Judgment Order becomes final, the issues before this Court as between LUA and

AWI will be res judicata, having been decided in favor of LUA in the Henrico Action.

WHEREFORE, LUA hereby moves this Court for entry of a Protective Order providing a stay of all proceedings as to LUA to the end that this Court enter no ruling adverse to LUA's interest on the Motions for Summary Judgment filed by LUA and AWI.

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

James M. Thomas
BOUHAN, WILLIAMS & LEVY
447 Bull Street
P. O. Box 2139
Savannah, Georgia 31498

/s/S. Vernon Priddy, III
Frank B. Miller, III
Mary Louise Kramer
S. Vernon Priddy, III
Stacy M. Thompson
SANDS, ANDERSON, MARKS & MILLER
801 East Main Street, Suite 1400
P. O. Box 1998
Richmond, Virginia 23216-1998

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 1989, I mailed, postage fully prepaid, a true copy of the foregoing Motion for Protective Order to John H.

Harwood, II, Esquire, Wilmer, Cutler & Pickering, 2445 M Street, N. W., Washington, D.C. 20037, Bobby Jones, Esquire, Doremus and Jones, P. O. Box 296, Metter, Georgia 30439, James W. Greene, Esquire, Bromley, Brown & Walsh, 1625 Eye Street, N.W., Suite 512, Washington, D.C. 20006, Benny C. Priest, Esquire, Drew, Eckl & Farnham, 880 West Peachtree Street, P. O. Box 7600, Atlanta, Georgia 30357, and to Gerald P. Norton, Esquire, Pepper, Hamilton, & Scheetz, 1300 Nineteenth Street, N.W., Washington, D.C. 20036 and hand-delivered a true copy to John M. Tatum, Esquire, Miller, Simpson & Tatum, 400 Trust Company Bank Building, 33 Bull Street, Savannah, Georgia 31498, Joseph H. Barrow, Beckmann & Pinson, 127 Abercorn Street, Savannah, Georgia 31402, Paul W. Painter, Jr., Esquire, Painter, Ratterree, Connolly & Bart, 222 West Oglethorpe Avenue, Suite 401, Savannah, Georgia 31401, and to Arnold C. Young, Esquire, Hunter, Maclean, Exley & Dunn, P.C., 200 East St. Julian, Savannah, Georgia 31401.

/s/S. Vernon Priddy, III

GEORGIA:

IN THE SUPERIOR COURT OF
CHATHAM COUNTY

ATLANTIC WOODS INDUSTRIES, INC.	)	
	)	
Plaintiff,	)	
v.	)	Case
	)	No. 87-
ARGONAUT INSURANCE COMPANY,	)	1019B
CONTINENTAL CASUALTY COMPANY,	)	
INSURANCE COMPANY OF NORTH	)	
AMERICA, LUMBERMEN'S	)	
UNDERWRITING ALLIANCE AND	)	
RANGER INSURANCE COMPANY,	)	
Defendants.	)	

DEFENDANT, LUMBERMEN'S UNDERWRITING ALLIANCE' PLEA OF RES JUDICATA AND MOTION TO DISMISS PLAINTIFF'S AMENDED MOTION FOR DECLARATORY JUDGMENT

Comes now, Lumbermen's Underwriting Alliance ("LUA"), by counsel, and moves this court to dismiss AWI's Amended Motion for Declaratory Judgment against LUA as barred by the doctrine of res judicata, all as more particularly set forth in LUA's accompanying brief.

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

/s/James M. Thomas

GEORGIA:

IN THE SUPERIOR COURT OF
CHATHAM COUNTY

ATLANTIC WOODS INDUSTRIES, INC.	)	
	)	
Plaintiff,	)	
v.	)	Case
	)	No. 87-
ARGONAUT INSURANCE COMPANY, ET AL.,	)	1019B
	)	
Defendants.	)	

MEMORANDUM OF
LUMBERMAN'S UNDERWRITING ALLIANCE
IN SUPPORT OF ITS MOTION TO
DISMISS AWI'S AMENDED MOTION
FOR DECLARATORY JUDGMENT

The defendant, Lumbermen's Underwriting Alliance ("LUA"), by counsel, submits this Memorandum in Support of its Motion to Dismiss based on the doctrine of res judicata. For the reasons stated herein the plaintiff's Amended Motion for Declaratory Judgment must be dismissed with prejudice as to LUA.

I.
SUMMARY OF PERTINENT FACTS

In September, 1987, LUA filed a Motion for Declaratory Judgment in the Circuit Court of Henrico County, Virginia styled Lumbermen's Underwriting Alliance v. Atlantic Wood Industries, Inc., bearing Law Number 86-L-350 ("the Henrico action"). LUA subsequently filed its Amended Motion for Declaratory

Judgment (attached as Exhibit A) upon which it ultimately moved for summary judgment.

Atlantic Woods Industries, Inc. ("AWI") filed an Answer and Grounds of Defense to LUA's Amended Motion for Declaratory Judgment and a Counterclaim (attached as Exhibit B) in the Henrico action. LUA's Amended Motion for Summary Judgment in the Henrico action, filed on May 23, 1988, included the issues presented before this court on the parties' cross-motions for summary judgment. AWI filed a cross-motion for summary judgment in the Henrico action as it has also done in this action. These pleadings presented the Circuit Court of Henrico County with a broad range of issues including all the issues raised in this action.

The Circuit Court of Henrico County ruled in favor of LUA as to all issues except the assignment issue, which it chose not to address. Judge Kulp entered a Judgment Order on February 10, 1989. (A copy of the Final Judgment Order is attached as Exhibit C.) Pursuant to Rule 1:1, Rules of the Supreme Court of Virginia, this Judgment Order became final on March 4, 1989.

AWI noted its appeal to the Supreme Court of Virginia on March 1, 1989.

AWI has not brought all its purported insurers before this court. Although it acknowledges, for example, that two primary carriers are limited payments to AWI. (See AWI's Brief filed Dec. 19, 1988 p. 17). While their specific arrangement with AWI is unclear, these carriers are not, evidently, providing AWI with a complete defense. AWI's counsel represented at the hearing held in this court on February 23, 1989 that AWI has settled with Argonaut Insurance Company, leaving LUA as the only purported primary carrier as a party to this action.

LUA instituted the declaratory judgment action in the Henrico Circuit Court before AWI filed this action

in Georgia. LUA diligently pursued a declaratory judgment in the Henrico action. LUA should not now be required to re-litigate the exact same issues against AWI in another court when a court of competent jurisdiction has already ruled on these issues and granted summary judgment in favor of LUA.

II.
ARGUMENT
A.

1. THE ISSUES PRESENTLY BEFORE THIS COURT HAVING BEEN DECIDED IN FAVOR OF LUA IN THE HENRICO ACTION PURSUANT TO A VIRGINIA FINAL JUDGMENT ORDER ARE RES JUDICATA AS BETWEEN LUA AND AWI

To assert res judicata successfully, a party must show that a prior suit involved the same issues, was contested by the same parties and was decided by a court of competent jurisdiction. See Boozer v. Higdon, 252 Ga. 276, 313 S.E.2d 100, (1984). Once a final judgment is proven, it is conclusive upon the parties as to all matters which were or could have been raised at the first proceeding. Id.

Without question, the Henrico action involved the same issues (and more) that confront this court. A review of AWI's Amended Motion for Declaratory Judgment filed in this action and its Counterclaim filed in the Henrico action (even ignoring LUA's pleading) demonstrates the identity of issues.

Also, without question, LUA and AWI, the parties to the Henrico action are both parties to this action. LUA and AWI each had an opportunity and, in fact, litigated the merits of the issues raised in this action in the Henrico action. All of the issues dispositive of the

case have been decided in favor of LUA by a court of competent jurisdiction in Henrico County, Virginia.

The Henrico court entered a final judgment order in favor of LUA on February 10, 1989. Pursuant to Rule 1:1, Rules of the Virginia Supreme Court this order became final on March 4, 1989. See also Hirschkop v. Commonwealth, 209 Va. 678, 166 S.E.2d 322, (1969), cert. den. 396 U.S. 845 (1969) (postponement of execution of sentence for purpose of appeal does not affect finality of judgment); Smith v. Commonwealth, 195 Va. 297, 77 S.E.2d 860 (1953) (voidable judgment can only be corrected by timely appellate review after 21 days from date of entry).

2. RES JUDICATA BARS THIS ACTION AS BETWEEN LUA AND AWI BECAUSE VIRGINIA ACCORDS FINALITY TO THE HENRICO JUDGMENT DURING THE PENDENCY OF AN APPEAL AND THEREFORE THE HENRICO JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT FROM THIS COURT

AWI may argue that the Henrico judgment is not res judicata as to the issues raised in this action because AWI has appealed the Henrico judgment. "This fact does not affect the [Henrico] judgment's binding force in a second court as to all issues, including that of jurisdiction, where the appeal remains binding and final between the parties under the law of the state rendering the judgment." Fidelity Stand. Life Ins. Co. v. First Nat'l Bank & Trust Co., 510 F.2d 272, 273, (5th Cir. 1975), cert. den. 423 U.S. 864 (1975) (citations omitted).

In Fidelity, an action was brought in the United States District Court for the Southern District of Georgia to enforce a Louisiana state court judgment.

The district court held that the Louisiana judgment was entitled to full faith and credit and granted summary judgment to the plaintiff. On appeal, the Fifth Circuit affirmed the district court holding that, although the Louisiana judgment was on appeal in the state court system, it remained res judicata under Louisiana law and, therefore, was entitled to full faith and credit unless and until reversed on appeal. 510 F.2d at 273 (citations omitted).

The Restatement 2d, Judgments (1982)[1] § 13, comment f, states that:

> [t]he better view is that a judgment otherwise final remains so despite the taking of an appeal; finality is not affected by the fact that the taking of an appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement; or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.

Virginia, as indicated above, follows the Restatement position. Under Rule 1:1, Rules of the Virginia Supreme Court, the Henrico Judgment Order became final for all purposes on March 4, 1989. Therefore, under the Fidelity rationale, the Henrico judgment is res judicata as to the issues raised in this action and is entitled to be given full faith and credit by this court. See also Pope v. Shipp, 38 Ga. App. 483, 144 S.E. 345 (1928) (judgment of a court stands in full force and efficacy until reversed or set aside).

---

[1]The Restatement 2d, Judgments has been cited with approval in at least two Georgia cases. See Boozer v. Higdon, 252 Ga. 276, 313 S.E. 2d 100 (1984); Abba Gana v. Abba Gana, 251 Ga. 340, 304 S.E. 2d 909 (1983).

AWI has cited Greene v. Transportation Ins. Co., 169 Ga. App. 504, 313 S.E.2d 761, 763 (1984), to this court for the proposition that a judgment is not binding while being appealed.[2] Greene does not apply to this case; it describes the limited force Georgia law accords Georgia judgments on appeal. In Greene, the Georgia Court of Appeals, addressing a decision of the Georgia State Board of Workers' Compensation on appeal, refused to accord it res judicata effect in a subsequent Georgia state court case. The court pointed out that under Georgia law a judgment is suspended when on appeal. Id. Unlike Georgia, Virginia treats its judgments as final, conclusive on the parties except on appeal.

As set forth by the Fifth Circuit in Fidelity, where an appeal remains binding and final between the parties under the law of the state rendering the judgment, it is entitled to full faith and credit and is res judicata as between the parties. 510 F.2d at 273.

CONCLUSION

For the foregoing reasons LUA respectfully requests that this court dismiss with prejudice AWI's Amended Motion for Declaratory Judgment as to LUA because it is barred by the doctrine of res judicata.

---

[2]AWI's Brief in Opposition to the Defendants' Motion for Summary Judgment and in Support of its Request for Discovery and Cross Motion for Summary Judgment at page 4, footnote 8.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, a true copy of the foregoing Motion to Dismiss to all counsel of record this 8th day of March, 1989.

/s/James M. Thomas

IN THE SUPERIOR COURT OF
CHATHAM COUNTY
STATE OF GEORGIA

ATLANTIC WOOD INDUSTRIES, INC.	)	
	)	
Plaintiff,	)	
v.	)	C.A.
	)	No.X87-
ARGONAUT INSURANCE COMPANY,	)	1019-
CONTINENTAL CASUALTY COMPANY,	)	B
INSURANCE COMPANY OF NORTH	)	
AMERICA, LUMBERMEN'S	)	
UNDERWRITING ALLIANCE, AND	)	
RANGER INSURANCE COMPANY,	)	
Defendants.	)	

MOTION FOR SUMMARY JUDGMENT OF
LUMBERMEN'S UNDERWRITING ALLIANCE
(Oral Argument Requested)

Pursuant to Rules 6.1 and 6.5 of the Uniform Superior Court Rules, and Rule 56 of the Georgia Civil Practice Act defendant Lumbermen's Underwriting Alliance ("LUA") moves for summary judgment that it has no obligation to defend or to pay the defense costs of plaintiff Atlantic Wood Industries, Inc. ("AWI") with respect to an investigation by the United States Environmental Protection Agency ("EPA") of pollution at AWI's wood treatment facility in Portsmouth, Virginia. As set forth in the accompanying memorandum, there are no genuine issues of material fact and LUA is entitled to judgment as a matter of law. LUA has not breached any contractual obligation to defend AWI because the relevant LUA insurance policies obligate

LUA to defend only suits seeking legal "damages" and the EPA investigation involves equitable relief, not "damages."

LUA respectfully requests oral argument on this motion.

Respectfully submitted,

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

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Richmond, Virginia 23216-1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of September, 1988, caused to be served copies of the foregoing "Motion for Summary Judgment of Lumbermen's Underwriting Alliance" "Memorandum in Support of the Motion of Lumbermen's Underwriting Alliance for Summary Judgment," "Statement by Defendant Lumbermen's Underwriting Alliance of Material Facts as to which There Is No Genuine Issue to be Tried," "Statement by Lumbermen's Underwriting Alliance of Plaintiff's Theory of Recovery" by first class mail upon counsel of record for all parties at the following addresses:

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/s/James M. Thomas by James L. Elliott

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

LUMBERMEN'S UNDERWRITING ALLIANCE,	)	
Plaintiff,	)	
v.	)	Law No. 86-L-350
ATLANTIC WOOD INDUSTRIES, INC.,	)	
Defendant.	)	

PLAINTIFF LUMBERMEN'S UNDERWRITING ALLIANCE'S AMENDED MOTION FOR SUMMARY JUDGMENT

Lumbermen's Underwriting Alliance ("LUA"), by counsel, pursuant to Rule 3:18, Rules of the Supreme Court of Virginia, moves this Court for summary judgment on the following grounds:

1. LUA issued the following policies (the "Policies") to Atlantic Creosoting Co., Inc., a Maryland corporation renamed Atlantic Wood Industries, Inc. in 1978 (the "named insured"):

Property Policies	Inception Date
103560	01/01/69
105519	07/09/69
121186	01/01/72
122544	07/09/72
140049	01/01/75
129801	07/09/75
142584	01/01/78
168740	10/01/78
182999	10/01/81

301178	10/01/84
302546	10/01/85

Comprehensive General
Liability ("CGL") Policies

211328	02/01/78
211514	02/01/79

2. The Policies insured, among other risks, a wood-preserving plant located in Portsmouth, Virginia (the "Facility").

3. On November 30, 1985, the named insured sold the Facility to Atlantic Wood Industries, Inc., a Georgia corporation, and the defendant herein ("AWI").

4. On February 3, 1986, AWI sent a demand letter to LUA alleging "certain occurrences" at the Facility and requested that LUA defend AWI with respect to these occurrences and pay any damages, costs or expenses resulting from those occurrences.

5. LUA denied AWI's claim but tendered a defense to AWI, subject to a full reservation of rights, and filed this action asking the Court to declare that AWI's claims are not covered by the LUA Policies issued to the named insured.

6. LUA submits that the following issues are ripe for summary judgment:

I. whether AWI is a valid assignee of the Policies entitled to coverage;

II. under the CGL policies,

A. whether the costs for which AWI seeks reimbursement constitute "damages" within the meaning of the CGL policies;

B. whether the costs for which AWI seeks reimbursement constitute payment of a liability claim for property

damage within the coverage of the CGL policies;

C. whether the EPA's directives to AWI constitute the filing of a "suit" within the meaning of the CGL policies, thus triggering LUA's duty to defend or to indemnify;

D. whether the costs for which AWI seeks reimbursement are expressly excluded under the CGL policies as alleged damage to property owned, occupied, rented or used by the insured or property in the care, custody, or control of the insured; and

E. whether AWI's execution of the Consent Order constitutes liability assumed by the insured within the meaning of the CGL policies.

III. under the property policies,

A. whether AWI's claims are barred by the applicable statute of limitations;

B. whether AWI has alleged or sustained loss of or damage to items of property covered by the property policies;

C. whether AWI has alleged or sustained loss of or damage to items of property from a covered peril under the property policies;

D. whether LUA has a duty to defend AWI under the property policies;

E. whether the damages, costs and expenses claimed by AWI, incurred as a result of "contamination," are excluded under the property policies;

F. whether the damages, costs and expenses claimed by AWI were incurred in response to "legal proceedings" as this term is used in the property policies; and

G. whether the damages, costs and expenses claimed by AWI were incurred in response to "order" of "any civil authority" as these terms are used in the property policies.

7. There are no material issues of fact in dispute and LUA is entitled to judgment on these issues as a matter of law.

WHEREFORE and for the foregoing reasons LUA requests that summary judgment be entered in its favor on the Amended Motion for Declaratory Judgment and that it be awarded its costs and attorney's fees expended herein.

LUMBERMEN'S UNDERWRITING ALLIANCE
By Counsel

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CERTIFICATE

I certify that a true copy of the foregoing Amended Motion for Summary Judgment was hand-delivered to David O. Ledbetter, Esquire, Hunton & Williams, 707 East Main Street, Richmond, Virginia 23219, and mailed, postage prepaid, to Gerald P. Norton, Esquire, Pepper, Hamilton and Scheetz, 1777 F. Street, N.W., Washington, D.C. 20006-5203, this 23rd day of May, 1988.

/s/Eva L. Dillard

A Copy Teste:
Margaret B. Baker, Clerk

/s/David M. Hicks
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF HENRICO

LUMBERMEN'S UNDERWRITING ALLIANCE, Plaintiff,	)
v.	) At Law
ATLANTIC WOOD INDUSTRIES, INC., Defendant.	) No. 86 -L-350

DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT OR DISMISSAL

Pursuant to Rule 3:18 Rules of the Supreme Court of Virginia, defendant, Atlantic Wood Industries, Inc. ("AWI"), moves this Court for summary judgment in its favor, declaring that plaintiff, Lumbermen's Underwriting Alliance ("LUA") has a duty to defend AWI in connection with action against it by the United States Environmental Protection Agency ("EPA"), and AWI also asks for a declaration in its favor with respect to the issues raised by LUA in its Amended Motion for Summary Judgment.

In support of its Motion AWI states that:

1. LUA issued the following Comprehensive General Liability policies to AWI's predecessor-in-interest:

211514
211328

2. LUA also issued the following property policies to AWI's predecessor-in-interest:

302546 II

301178
182999
168740
142584
140049
129801
122544
105519
103560 (missing)
121186 (missing)

3. There are not genuine issues as to any material facts respecting the issues raised by AWI in its Summary Judgment Motion relating to LUA's duty to defend, and AWI is entitled to a summary judgment in its favor on those issues as a matter of law.

4. The issue of whether LUA has a duty to defend AWI is separate and distinct from the issue of whether LUA will ultimately be liable for indemnifying AWI with respect to any remediation of environmental pollution that may be required by EPA or with respect to natural resource damages for which AWI may be liable, and indemnification issues are not ripe under the facts of this case.

5. To the extent that the issues raised in LUA's Amended Summary Judgment Motion are ripe for adjudication, LUA's motion should be denied.

WHEREFORE, AWI requests that this Court:

1. Dismiss Argonaut's action with respect to the issue of indemnification because they are not ripe for adjudication.

2. Enter judgment for AWI, specifically declaring that LUA has a duty to defend AWI under the CGL policies and property policies 182999 and 168740.

Further reasons and authorities in support of this Motion are set forth in the accompanying Brief In Support, affidavits, and exhibits, and are incorporated herein by reference.

Respectfully submitted,

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Date: June 3, 1988

APPENDIX E*

* The documents set forth in Appendix E are excerpted and omissions are shown by the form [••••].

FILED: August 14, 1990

[••••]

IN THE SUPREME COURT OF
THE STATE OF GEORGIA

ATLANTIC WOOD INDUSTRIES, INC., *Appellant*, v. LUMBERMEN'S UNDERWRITING ALLIANCE, CONTINENTAL CASUALTY COMPANY, INSURANCE COMPANY OF NORTH AMERICA AND RANGER INSURANCE COMPANY, *Appellees*.	PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA IN APPEAL NOS. A90A0100 A90A0101

LUMBERMEN'S UNDERWRITING ALLIANCE'S
PETITION FOR WRIT OF CERTIORARI

Petitioner Lumbermen's Underwriting Alliance ("LUA"), by counsel, pursuant to Art. 6, § 6, ¶ 5 of the Constitution of the State of Georgia, respectfully petitions this Court to grant it a writ of *certiorari* to the Court of Appeals of the State of Georgia to review its opinion issued July 12, 1990 in the above-styled appeals.

[••••]

The opinion presents issues of gravity, great concern and importance to the public as the Court of Appeals

incorrectly refused to honor the Full Faith and Credit clause of the United States Constitution (and legislation implementing it), and incorrectly decided issues of first impression.

[••••]

II.
ENUMERATION OF ERRORS

Errors by the Court of Appeals justify the granting of a writ of *certiorari* to the Court of Appeals in this matter involving issues of gravity, great concern and importance to the public.

First, the Court of Appeals ignored the Full Faith and Credit Clause of the United States Constitution, as well as the pertinent language of the United States and Georgia Codes implementing that constitutional mandate.

[••••]

The Full Faith and Credit clause of the United States Constitution, and federal and Georgia legislation carrying that clause into effect, mandate that this Court reverse the judgment of the Court of Appeals denying LUA's motion to dismiss AWI's appeal. The Full Faith and Credit clause provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State and the Congress may by General Laws prescribe the Manner in which Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

The United States Congress took up the authority granted by the Full Faith and Credit clause and directed that

> [s]uch ... judicial proceedings or copies thereof ... shall have the same Full Faith and Credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.

28 U.S.C. § 1738 (emphasis added).

[••••]

IV.
CONCLUSION

For the reasons stated above, LUA requests this Court to grant it a writ of *certiorari* in this matter, as the Court of Appeals failed to properly consider the *res judicata* effect of the judgment of the Circuit Court of the County of Henrico and, moreover, must dismiss this action as to LUA.

[••••]

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

[••••]

(2)

No. 90-855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LUMBERMEN'S UNDERWRITING ALLIANCE,
Petitioner,

v.

ATLANTIC WOOD INDUSTRIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia

---

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "adequate and independent state grounds" doctrine precludes review of a Georgia Court of Appeals decision denying Petitioner's *de novo* motion to dismiss Respondent's pending appeal for reasons of *res judicata* founded on a foreign judgment, where such denial was based on the state appellate court's consistently applied jurisdictional restrictions and limited authority to dismiss appeals?

2. Whether under the facts of this case the Georgia Court of Appeals correctly denied Petitioner's motion to dismiss Respondent's appeal where Petitioner (1) failed to prove threshold requirements for the application of full faith and credit; (2) waived the *res judicata* defense under Georgia law by not filing a notice of appeal; and (3) asserted inconsistent positions in the Georgia Court of Appeals as to when the foreign judgment it sought to plead as *res judicata* became final?

RULE 29.1 STATEMENT

Respondent Atlantic Wood Industries, Inc., is an employee-owned, Georgia corporation, headquartered in Savannah, Georgia. Atlantic Wood Industries, Inc. has three wholly-owned subsidiaries: Atlantic Wood International Sales Corporation, Ltd., a U.S. Virgin Island corporation; Atlantic Leasing Company, a Georgia corporation; and Atlantic Wood Transport, Inc., a Georgia corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-855

LUMBERMEN'S UNDERWRITING ALLIANCE,
Petitioner,

v.

ATLANTIC WOOD INDUSTRIES, INC.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia

---

BRIEF OF THE RESPONDENT IN OPPOSITION

Respondent Atlantic Wood Industries, Inc. ("AWI") submits this brief in opposition to petitioner Lumbermen's Underwriting Alliance's ("LUA") Petition for a Writ of Certiorari ("Pet." or "Petition").

COUNTER-STATEMENT OF THE CASE

AWI is a Georgia corporation, headquartered in Savannah, Georgia. AWI owns and operates wood treatment facilities, including one in Portsmouth, Virginia ("facility"), which it acquired in late 1985 from its predecessor-in-interest, its former parent company. In connection with that transfer of ownership, the parent assigned to AWI all assets, contracts, and specifically all claims the parent had under insurance policies covering the facility, including the primary property and comprehensive general liability policies issued by LUA. The policies in question here were issued in Georgia.

In 1986, the United States Environmental Protection Agency ("EPA") initiated an action against AWI alleging specified contamination at the facility and asserting AWI was liable therefor under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601, *et seq.* (1988). AWI engaged legal counsel and technical consultants to defend against the EPA action and signed an administrative consent order in 1987. The order requires AWI to undertake certain measures, which are currently underway. Most of AWI's insurers, including LUA, have refused to defend it or to pay any portion of its ongoing defense or other costs incurred in the EPA action.

A. Georgia Trial Court Proceedings And Rulings

AWI was forced to institute the Georgia action at issue here in the Superior Court of Chatham County, Georgia in April 1987, against LUA and other insurers of the facility because three insurers had already sued or were about to sue AWI in three different courts. In addition to LUA, which had instituted an action against AWI in Virginia state court,[1] one insurer sued AWI in the federal district court for the Eastern District of Virginia,[2] and another insurer had sued AWI in Chatham County, Georgia Superior Court.[3]

AWI's first amended complaint sought a declaration that the policies issued by the insurers to AWI's predecessor-in-interest were validly assigned to AWI giving it rights under those policies, and that the insurers had a duty to defend AWI. This complaint also alleged that the insurers had breached their duty to defend AWI

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[1] *Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc.*, Law No. 86-L-350 (Henrico C'ty, Va. filed Sept. 11, 1986).

[2] *Argonaut Ins. Co. v. Atlantic Wood Indus., Inc.*, C.A. No. 87-323-R (E.D. Va. filed Apr. 16, 1987).

[3] *Ranger Ins. Co. v. Atlantic Wood Indus., Inc.*, No. 87-0335-B (Super. Ct. Chatham C'ty, Ga. filed Feb. 5, 1987).

against the EPA action. LUA and the other insurers raised a host of defenses in their answers based on certain terms and provisions in their respective policies.[4]

In the fall of 1988, all of the defendant insurers moved for partial summary judgment on only one of their many coverage defenses,[5] namely that they owed no duty to defend or indemnify AWI because the term "damages" in their policies only covered amounts paid as "legal" relief, whereas they alleged that the EPA action sought "equitable" relief. AWI opposed the insurers' motions on the merits, and cross moved requesting a ruling that the defenses raised in the insurers' motions did not negate their duty to defend AWI, and that AWI was a valid assignee under the policies issued by all of the insurers, including LUA.

After the hearing on the parties' partial summary judgment motions, LUA filed a motion in the trial court in March 1989 to dismiss AWI's "Amended Motion for Declaratory Judgment" [6] as barred by the doctrine of *res judicata* (Pet. App. D at D-5-12). This motion was based on the fact that a Virginia trial court had specifically ruled in LUA's favor on the "damages" question in February 1989,[7] and LUA's assertion that the Virginia

---

[4] They asserted, for example, that the EPA action did not seek "damages" and constitute a "suit" triggering the insurers' duty to defend; that the alleged contamination at the facility did not constitute "property damage"; and that the policies were not properly assigned to AWI by its predecessor-in-interest. LUA had raised similar defenses in the separate action it brought against AWI in Virginia state court; *see* Petition Appendix ("Pet. App.") D at D-13-14; D-19-21.

[5] The excess carriers also alleged that their duties were not triggered because the underlying coverage had not been exhausted.

[6] No pleading by that name was ever filed by AWI in the trial court.

[7] *Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc.*, Law No. 86-L-350 (Henrico C'ty, Va. Feb. 10, 1989) ("Virginia judgment").

judgment had become final on March 4, 1989 (Pet. App. D at D-7).[8] AWI opposed LUA's motion in the Georgia trial court.

On May 30, 1989, the Georgia trial court entered two orders in response to all the parties' partial summary judgment motions. In the order at issue here (Pet. App. A at A-13 ("LUA order")), the trial court granted the summary judgment motions of LUA and two excess insurers, ruling that they had no duty to defend or indemnify AWI because the term "damages" did not cover the relief sought in the EPA action. The LUA order, however, did not address the assignment issue raised by AWI in its cross-motion, even though the second order respecting another insurer decided the assignment issue in favor of AWI (Pet. App. A at A-7). The LUA order also did not grant LUA's motion to dismiss on *res judicata* grounds. Since the trial court reached the merits, LUA's *res judicata* motion was implicitly denied.

AWI filed an appeal of the LUA order, assigning error, *inter alia*, to the trial court's denial of AWI's summary judgment motion on the "damages" issue and its failure to rule in AWI's favor on the "assignment" issue. LUA, however, did not appeal the trial court's failure to grant its *res judicata* motion, despite the fact that the relief it sought, *i.e.*, dismissal, is not consistent with the judgment on the merits granted by the trial court.

B. Georgia Court Of Appeals Proceedings And Rulings

Instead of appealing the trial court's apparent denial of its motion to dismiss, LUA raised the *res judicata* and "estoppel by judgment" defenses *de novo* in the Georgia Court of Appeals by a motion to dismiss AWI's appeal based on allegedly new developments (Pet. App. C at

---

[8] In the Petition LUA now asserts that its motion in the trial court "rested upon the *arguable* finality" of the Virginia judgment (Pet. p. 9 (emphasis added)). This position is inconsistent with its representation in the trial court and clearly self-serving.

C-1; C-3; C-6). Simply stated, LUA chose not to follow the Georgia procedural rules governing matters to be decided by the Court of Appeals.

AWI opposed LUA's motion on the following grounds: (1) no Georgia case law or procedural rule permits raising the *res judicata* or "estoppel by judgment" [2] defenses *de novo* in the Georgia Court of Appeals; (2) the Virginia judgment had not yet been finally concluded; (3) not all of AWI's claims against LUA at issue in the Georgia action were decided in the Virginia action, and not all remaining prerequisites for the application of *res judicata* and collateral estoppel had been met; and (4) LUA's submission of the record of the Virgina judgment was defective ("Opposition to Lumbermen's Underwriting Alliance's Motion to Dismiss," Appendix A).

In a supplemental memorandum to the Court of Appeals, LUA argued, *inter alia*, that the trial court had ignored its motion to dismiss, and that *res judicata* could serve as an alternative basis for affirming the trial court's ruling on the "damages" issue in LUA's favor (LUA's "Supplemental Post-Argument Memorandum," excerpt, Appendix B). This argument by necessity represented to the Court of Appeals that the Virginia judgment had become final while AWI's case was still pending in the trial court. Otherwise, the Virginia judgment could not even arguably serve as an alternative basis for upholding the trial court's ruling on the merits.

The Georgia Court of Appeals summarily denied LUA's motion to dismiss, finding that "the initial pendency of the Virginia . . . action did not serve to abate the instant Georgia action. O.C.G.A. § 9-2-45. Likewise, the subse-

---

[2] The Petition states that LUA is not waiving this defense (Pet. p. 7, n.4). To the extent applicable, this opposition is addressed to both the correctness of denying LUA's motion to dismiss based on its *res judicata* defense and its "estoppel by judgment" defense.

quent finality of the Virginia . . . action is not ground for dismissing the instant appeals. O.C.G.A. § 5-6-48 (b)." *Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance*, 196 Ga. App. 503, 504, 396 S.E.2d 541, 542 (1990) (Pet. App. A at A-2-3).

REASONS FOR DENYING THE PETITION

I. THE GEORGIA COURT OF APPEALS' DECISION RESTS ON "ADEQUATE AND INDEPENDENT STATE GROUNDS" AND IS THEREFORE NOT SUBJECT TO REVIEW BY THE COURT

Contrary to LUA's assertion, the ruling of the Georgia Court of Appeals denying its motion to dismiss does not raise questions respecting the "Full Faith and Credit Clause and the Statute implementing it" (Pet. p. 5). Rather, this case is about LUA's failure to follow proper state appellate procedures and to present the requisite evidence to have the Georgia courts grant full faith and credit to the Virginia judgment.

This Court has long adhered to the principle that it will not review judgments of state courts that rest on "adequate and independent state grounds," which include state appellate procedures. *See, e.g., Parker v. Illinois*, 333 U.S. 571, 574 (1948) (failure to follow state appellate procedure is adequate and independent state grounds for denial of federal right which was waived); *Wolfe v. North Carolina*, 364 U.S. 177, 195-96 (1960) (same). Therefore, contrary to LUA's contention (Pet. p. 10), this case does not present the Court with a question of first impression. For example, this Court specifically held in *Wolfe*, *supra*, 364 U.S. at 195, that:

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less

> applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan v. Bransford*, 139 U.S. 197; *Brown v. Massachusetts*, 144 U.S. 573; *Jacobi v. Alabama*, 187 U.S. 133; *Hulbert v. Chicago*, 202 U.S. 275, 281; *Newman v. Gates*, 204 U.S. 89; *Chesapeake & Ohio Railway Co. v. McDonald*, 214 U.S. 191, 195." *John v. Paullin*, 231 U.S. 583, 585. "[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Nickel v. Cole*, 256 U.S. 222, 225. [footnote omitted].

The Georgia Constitution provides that the jurisdiction of the Court of Appeals is limited to matters that are raised by a notice of appeal or cross appeal. Georgia Const. art. VI, § V, par. III (1983).[10] Georgia law is well settled, and the Court of Appeals strictly adheres to this limitation. *See, e.g., Jordan v. Caldwell*, 229 Ga. 343, 344, 191 S.E.2d 530, 531 (1972) (proper and timely filing of notice of appeal is absolute requirement to confer jurisdiction on appellate court); *Sturdy v. State*, 192 Ga. App. 71, 72, 383 S.E.2d 632, 634 (1989) (role as an intermediate appellate court is limited to correcting lower court's errors of law); *Selfridge v. Morrison Cafeteria Co.*, 192 Ga. App. 469, 470, 385 S.E.2d 137, 139 (1989) (since appellee did not file cross appeal, its motion to remand not properly before court).

As a corollary to the jurisdictional limits of the Court of Appeals under Georgia's Constitution, the Georgia

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[10] Paragraph III states in pertinent part:

> The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law.

legislature enacted O.C.G.A. § 5-6-48(b) (Pet. p. 5), which provides that an appeal can be dismissed only for three reasons: (1) the notice of appeal is not timely filed; (2) the decision is not appealable; and (3) the question presented is moot.[11] Since none of these enumerated defects existed, the Court of Appeals properly denied LUA's motion to dimiss AWI's appeal.

The statutory limitation on dismissing appeals set forth in O.C.G.A. § 5-6-48(b) serves the legitimate state interest of restricting the jurisdiction of the appellate court to the review of errors of law committed by trial courts. *See, e.g., Wolfe, supra*, 364 U.S. at 196 (requirement that facts be included in record on appeal before being cognizable by state appellate court was adequate and independent state ground).

As specifically noted by this Court in *Webb v. Webb*, 451 U.S. 493, 498 n.4 (1981), a Georgia Supreme Court rule prescribing the manner of presenting the federal issue, which was not followed by petitioner, could present "an independent state procedural ground barring our consideration of the federal issue." Rule 45 of the Georgia Supreme Court Rules, referred to in *Webb*, provided that any enumeration of errors not supported by argument or citation "shall be deemed abandoned." *Id.* Similarly,

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[11] LUA complains that "it should not now be required to continue battling AWI over identical issues . . ." (Pet. p. 16), and that "the questions presented . . . have become moot" (Pet. p. 18 n.10). As LUA acknowledges, the "assignment" question was not decided by the Virginia judgment (Pet. p. 18 n.10) but was raised in AWI's Georgia appeal. The Georgia appeal, therefore, did not involve "identical issues" decided in the Virginia judgment and could not have been dismissed as moot under O.C.G.A. § 5-6-48(b)(3). Furthermore, contrary to LUA's contention (Pet. p. 18 n.10), the assignment issue relates not only to the current insurance dispute with LUA, but also to the very existence of a contractual relationship between AWI and LUA and to other currently pending coverage claims (Appendix C). In any event, the mootness question involves application of settled principles of Georgia law to the particular facts of this case and does not warrant the Court's review

in this case the Georgia rules limiting the Court of Appeals' jurisdiction and its authority to dismiss valid appeals provide adequate and independent state grounds for declining review of the Petition.

By filing its motion to dismiss *de novo* in the Court of Appeals, LUA admittedly did not follow the Georgia appellate procedure, even though the avenue by which it could have raised its full faith and credit claim in the Court of Appeals "was not only clearly marked, it was also open and unobstructed," as required by this Court. *Parker*, *supra*, 333 U.S. at 575. Here, as in *Wolfe*, *supra*, 177 U.S. at 193, the "state court simply followed [its] settled rule of local practice," and its decision is therefore not reviewable by the Court.

In addition, the Court has frequently reiterated the rule that "when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'" *Webb*, *supra*, 451 U.S. at 495 (citations omitted). While LUA has raised the *res judicata* issue in the Court of Appeals, it has not "done so by a proper presentation," *i.e.*, a notice of appeal. Therefore, the Petition must be denied as it was in *Parker* and *Wolfe*.

Finally, as the Petition points out (Pet. p. 17 n.9), the Georgia legislature implemented the full faith and credit requirement in O.C.G.A. § 24-7-24(a)(2). Therefore, the Georgia legislature was fully cognizant of the constitutional requirement to give full faith and credit to properly authenticated, final foreign judgments when it enacted the restrictions on the jurisdiction and dismissal authority of the Court of Appeals. Neither the Georgia legislature nor the Court of Appeals "ignored" this statute or the United States Constitution, as alleged by LUA (Pet. p. 17 n.9).

II. THE GEORGIA COURT OF APPEALS CORRECTLY DENIED LUA'S MOTION TO DISMISS AWI'S APPEAL ON THE FACTS OF THIS CASE

The Court of Appeals properly denied LUA's motion to dismiss under the facts of this case for the following reasons.

First, LUA did not meet the threshold requirement for invoking the full faith and credit clause. LUA made no showing in the Georgia Court of Appeals that a Virginia appellate court would have dismissed a properly filed appeal based on a *res judicata* defense raised before it *de novo*. The Petition (p. 17 n.9) also ignores the qualifier in the Georgia statute setting forth the full faith and credit obligation, and the full faith and credit clause itself (Pet. p. 4), to the effect that final judgments of sister states shall only be given the *same* effect "as they have . . . *in the courts of such . . . state from which they are taken*" and not more. O.C.G.A. § 24-7-24(a)(2) (emphasis added). Since LUA has made no showing in the Court of Appeals (or the Petition) that a Virginia appellate court would have granted its *de novo* motion, the Georgia Court of Appeals properly denied LUA's motion under its own procedural statute, O.C.G.A. § 5-6-48(b) (Pet. App. A at A-2-3). *See, e.g., Underwriter's Nat'l Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982) (judgment of state court should have *same* credit, validity, and effect in every other court of the United States, as in state where it was pronounced); *Kelly v. Kelly*, 115 Ga. App. 700, 701, 155 S.E.2d 732, 733-34 (1967) (properly authenticated judgment from sister state is generally entitled to have same full faith and credit, *and not more*, than it would receive in state where rendered).

Second, the Court of Appeals correctly denied LUA's motion to dismiss because LUA could have, but did not, appeal the trial court's implicit denial of its motion to dismiss, and thereby waived its *res judicata* defense.

Under O.C.G.A. § 9-11-8(c), as under Fed. R. Civ. P. 8(c), *res judicata* is an "affirmative defense," which can be waived if not properly asserted or pursued. *See, e.g., Trend Dev. Corp. v. Douglas County*, 259 Ga. 425, 383 S.E.2d 123 (1989). LUA's decision not to appeal the trial court's failure to grant its motion to dismiss waived the defense under Georgia law, and precluded LUA from asserting it *de novo* in the Court of Appeals. *See, e.g., Parker, supra* (federal question not taken directly to state supreme court as required was waived). At the very least, LUA's failure to appeal raised questions of fact respecting waiver of the defense, which the Court of Appeals is not authorized to resolve. *See, e.g., Sturdy, supra.*

Third, the Court of Appeals correctly denied LUA's motion because LUA's own inconsistent assertions in the Court of Appeals and the trial court respecting when finality attached to the Virginia judgment created factual uncertainties. The Court of Appeals had no jurisdiction to resolve such questions of fact.

LUA now states that "a dispositive judgment of the Virginia Supreme Court [12] . . . became final during the pendency of the appeal in Georgia . . ." (Pet. p. 10). However, contrary to its current position, LUA unequivocally asserted in the Georgia trial court that the Virginia judgment had become final on March 4, 1989, *i.e., prior to* the LUA order issued by the Georgia trial court on May 30, 1989 (Pet. App. D at D-7). LUA repeated this assertion in the Court of Appeals (Pet. App. C at C-5), while representing simultaneously and inconsistently to the Court of Appeals, that the Virginia Supreme Court's denial of AWI's appeal in September 1989 resulted in a

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[12] LUA incorrectly describes the Order of the Virginia Supreme Court denying AWI's appeal as a "final judgment" (Pet. p. 7). This Order (Pet. App. B, at B-2-3) is not a "judgment" entitled to "full faith and credit," rather it is only an Order relating to the procedural posture of the Virginia judgment.

"final judgment." *Id.* Indeed, this allegedly new development in September 1989 provided the very basis on which LUA had originally premised its authority to bring a *de novo* motion to dismiss in the Court of Appeals (Pet. App. C at C-6).

In a subsequent submission to the Court of Appeals, LUA again changed its position on finality by arguing that *res judicata* should serve as an alternative basis for affirming the trial court's ruling in its favor on the "damages" question (Appendix B). Obviously, LUA could not and would not have made this argument to the Court of Appeals, if it truly believed the Virginia judgment only became final in September 1989 during the pendency of AWI's appeal, rather than in March 1989, while the case was still pending in the trial court.

To bolster its current position that finality attached during the pendency of the Georgia appeal, LUA mischaracterizes the Court of Appeals' holding as "acknowledging the sister state's judgment became final during the pendency of the appeal" (Pet. p. 11), and as "concluding the Virginia judgment became final during the pendency of the appeal" (Pet. p. 17; p. 18). The Court of Appeals, however, did not "acknowledge" that the Virginia judgment became final during the appeal. Rather, that court stated in plain language that (1) under the Georgia anti-abatement statute, O.C.G.A. § 9-2-45, the initial pendency of LUA's action did not abate AWI's action when filed, and (2) "the subsequent finality of the Virginia action" was not grounds for dismissing the appeal (Pet. App. A at A-2). The Court of Appeals did not voice any opinion as to when, "subsequent" to the filing of AWI's Georgia suit, the Virginia judgment had become final (Pet. App. A at A-5-6).

In sum, the Court of Appeals correctly denied LUA's motion to dismiss on the facts of this case: LUA failed to show that a Virginia appellate court would dismiss an appeal under similar circumstances; it waived the *res*

judicata defense by not appealing the implicit denial of its motion to dismiss in the trial court; and it asserted inconsistent positions with respect to the finality of the Virginia judgment. Under Georgia law, the Court of Appeals had no jurisdiction to resolve the factual issues raised by LUA's *de novo* motion to dismiss and therefore correctly denied LUA's motion on the facts of this case. *See, e.g., Barnes v. State*, 157 Ga. App. 582, 589, 277 S.E.2d 916, 921 (1981) (court of appeals is not a fact-finder or court of original jurisdiction, but a court for correction of errors below).

III. PETITIONER HAS OTHER REMEDIES AVAILABLE TO IT

The Court of Appeals has stayed remand of the case at LUA's request, pending the Court's decision on the Petition. However, once the case is remanded to the trial court, LUA is free to assert any remaining defenses to the insurance coverage sought by AWI.[13] If LUA prevails on any one of these defenses in the Georgia courts, this case will end, and the alleged constitutional question raised by LUA need not be addressed by any court. The Court, therefore, should dismiss the Petition on this basis alone.

CONCLUSION

For all the stated reasons, the Petition should be denied.

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January 3, 1991

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[13] *See* note 4, *supra*.

APPENDICES

APPENDIX A

IN THE COURT OF APPEALS
STATE OF GEORGIA

Appeal From Superior Court of
Chatham County
No. X87-1019-B

Appeal Nos: A90A0100
A90A0101

ATLANTIC WOOD INDUSTRIES, INC.,
Appellant,

v.

LUMBERMEN'S UNDERWRITING ALLIANCE,
CONTINENTAL CASUALTY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA, and
RANGER INSURANCE COMPANY,
Appellees.

OPPOSITION TO LUMBERMEN'S UNDERWRITING ALLIANCE'S MOTION TO DISMISS

INTRODUCTION

Appellee Lumbermen's Underwriting Alliance ("LUA") has moved to dismiss these appeals on the basis of *res judicata* and collateral estoppel. Appellant Atlantic Wood Industries, Inc. ("AWI") hereby opposes the motion on several grounds: (1) LUA's motion is not properly before this Court; (2) the Virginia action on which LUA relies has not yet been finally concluded;[1] and (3) AWI's

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[1] The judgment ("Virginia judgment") was rendered in *Lumbermen's Underwriting Alliance v. Atlantic Wood Indus., Inc.*, Law No. 86-L-350 (Henrico C'ty Feb. 10, 1989) ("Virginia action"), and is Exh. E to LUA Memorandum In Support Of Motion To Dismiss ("LUA Mem.").

claims against LUA at issue in this action were not all decided in the Virginia action.

SUPPLEMENTAL SUMMARY OF PERTINENT FACTS AND MATERIAL PROCEEDINGS

LUA bases its Motion on the fact that the Virginia Supreme Court denied AWI's Petition for Appeal in September 1989 on procedural grounds (LUA Mem. p. 3). However, LUA completely fails to mention the fact that in October AWI filed in the Virginia trial court a Motion to correct the judgment ("AWI Motion"),[2] as expressly permitted under Virginia Code § 8.01-428(B) (Exhibit B) and the inherent power of Virginia trial courts. The Virginia trial court's action on AWI's Motion may alleviate the procedural ground that led to denial of the appeal. LUA has filed a Petition For A Writ Of Prohibition in the Virginia Supreme Court, contending that the Virginia trial judge lacks jurisdiction to correct the Virginia Judgment. Both AWI and the Virginia Attorney General have opposed and moved to dismiss LUA's petition. The Virginia Supreme Court has not yet acted.

LUA also fails to mention the fact that prior to the trial court's order under appeal here, it had filed a motion to dismiss the action on the grounds of *res judicata* based on the same Virginia judgment (R. 1542-92). If granted, LUA's motion would have precluded the trial court from reaching the merits of the issues raised by the summary judgment motions. The trial court did not grant LUA's motion to dismiss and instead reached the merits, ruling in favor of LUA on the "damages" question. LUA has not challenged the trial court's failure to grant its motion to dismiss.

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[2] Certified copies of AWI's Motion and Memorandum In Support ("AWI Mem.") are attached hereto as Exh. A.

ARGUMENT

A. LUA's Motion Is Not Properly Before This Court

LUA has cited no authority permitting *res judicata* to be raised by motion to dismiss in the Court of Appeals rather than in the trial court. LUA's reliance on *Hudgens v. Local 315 Retail, Wholesale & Dept. Store Union*, 133 Ga. App. 329, 210 S.E.2d 821 (1974), *cert. denied*, 424 U.S. 957 (1976) (LUA Mem. p. 3), is entirely misplaced. That case involved a motion to dismiss an appeal based on mootness of the underlying controversy. Unlike *res judicata*, mootness is an issue involving the jurisdiction of the courts, which lack authority to render advisory opinions. Permitting mootness to be raised for the first time on appeal does not mean that non-jurisdictional matters such as *res judicata* can be raised by motion to dismiss the appeal. There are well established procedures and precedents for raising such issues in the trial court, especially when, as here, the action remains pending in the trial court.[3]

Moreover, as noted in *Hudgens*, this Court is "normally limited" to the facts reflected in the record on appeal in making its decisions. 133 Ga. App. at 33, 210 S.E.2d at 823. Permitting motions such as LUA's, which seek to introduce facts not in the record, would disrupt normal appellate procedure. However, even if LUA had chosen the right court, its submission of the record of the Virginia action is defective. As this Court held in *Doyal & Assoc. v. Blair*, 138 Ga. App. 314, 315, 226 S.E.2d 109 (1976), if a prior case is to have *res judicata* effect,

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[3] As noted by Judge Carley's earlier opinion in this case, "the rationale of retained jurisdiction [by the trial court] enunciated in *Cohran* [*v. Carlin*, 249 Ga. 510, 291 S.E.2d 538 (1982)] extends to the entry of collateral orders by the trial court even as that portion of the case which forms the underlying basis of the interlocutory appeal." *Argonaut Ins. Co. v. Atlantic Wood Indus., Inc.*, 187 Ga. App. 477, 370 S.E.2d 770, 772 (1988).

the entire record must be introduced into evidence. This Court also noted that the forms of law are necessary because "it is through form that all organization is reached." 138 Ga. App. at 317 (citation omitted). LUA's attempt to circumvent the normal appellate rules is especially egregious, since LUA had addressed a similar motion to the trial court (R. 1542-92), which the trial did not grant. If dissatisfied with the basis of the trial court's ruling, LUA's proper remedy would have been an appeal, assigning error to the trial court's decision to rule on the merits, thereby effectively denying LUA's motion to dismiss on *res judicata* grounds.

LUA's reliance on the plea of *puis darrein continuance* and *Teper v. Weiss*, 115 Ga. App. 621, 155 S.E.2d 730 (1967) (LUA Mem. p. 4), is equally misplaced. The common law plea of *puis darrein continuance* was used in Georgia and other jurisdictions prior to the modern rules of civil procedure. It only permitted the filing of a supplemental answer to a complaint in the trial court based on new facts or defenses that had arisen since the filing of the original answer. *See, e.g., Teper, supra*; *accord Cook v. Georgia Land Co.*, 120 Ga. 1068, 48 S.E. 378 (1904); *see generally* 61A Am. Jur. 2d *Pleading* §§ 125, 294 (1981 & 1989 Supp.). This particular plea has never been used to permit original appellate court jurisdiction for a motion to dismiss on *res judicata* grounds. It should not be so used here, especially since the defense presented in LUA's motion is not new.

B. AWI's Pending Motion To Correct Judgment Precludes Application Of *Res Judicata* And Collateral Estoppel Here

Under the "Full Faith and Credit" clause (U.S. Const. art. IV, § 1), " 'the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.' " *Underwriters Nat'l Assur. Co. v.*

North Carolina Life & Acc. & Health Ins. Guar. Ass'n, 455 U.S. 691, 704 (1982) (citations omitted). Therefore, under the full faith and credit clause, the *res judicata* and collateral estoppel effect of a foreign judgment, as opposed to the judgment of a court in the same state, is determined by the law of the state which rendered the judgment. *See, e.g., Boyer v. Korsunsky, Frank, Erickson Architects, Inc.*, 191 Ga. App. 549, 382 S.E.2d 362 (1989). LUA incorrectly describes Virginia law on finality for *res judicata* and collateral estoppel purposes.

Repeating an argument it made without success in the trial court (R. 1542, 1548), LUA states that the Virginia judgment became final under Rule 1:1, *Rules Of The Supreme Court Of Virginia* (LUA Mem. Addend.), and that AWI has totally exhausted the appellate process in Virginia (LUA Mem. pp. 2, 3). Rule 1:1 by its terms only addresses finality of a judgment for procedural purposes after 21 days have passed since entry. Rule 1:1 has expressly been held not to govern when a Virginia judgment is *res judicata* in another action between the parties. *See Prudential Ins. Co. v. Tull*, 524 F. Supp. 166 (E.D. Va. 1981). After surveying applicable Virginia Supreme Court precedent, the district court specifically held in *Tull* "that Rule 1:1 is addressed to the matter of finality only for purposes of defining procedural rights after entry of a judgment." *Id.* at 170.

The possibility of an appeal itself renders the Virginia judgment non-final under the applicable principles. Georgia has long followed the rule that "[a]s long as there remains the possibility that a decision might be overturned by a higher court," no preclusive effect attaches to the judgment. *Greene v. Transp. Ins. Co.*, 169 Ga. App. 504, 506, 313 S.E.2d 761, 763 (1984). Since there is no Virginia law to the contrary, *see Rook v. Rook*, 233 Va. 92, 95, 353 S.E.2d 756 (1987)), this Court is free to apply the Georgia rule respecting the finality of

judgments that may be subject to appeal.[4] The obvious rationale for this rule is judicial economy.[5] The contrary rule advocated by LUA gives rise to "a problem of inconsistent judgments when a judgment under appeal, relied on as a basis for a second judgment, is later reversed." Restatement (Second) of Judgments § 13 comment f (1982).

Furthermore, AWI's motion to correct is based on the authority of Va. Code § 8.01-438(B) and the trial court's inherent power[6] to correct its judgments, both of which are exceptions to the doctrine of *res judicata.* The Virginia Supreme Court has specifically construed Va. Code § 8.01-428(B) and the trial court's inherent power to correct judgments as "creat[ing] exceptions to the finality of judgments. . . ." *School Board v. Scott, Inc.*, 237 Va. 550, 554, 379 S.E.2d 319, 321 (1989). The Virginia judgment LUA seeks to plead here as *res judicata* or as a collateral estoppel bar is thus not final under Virginia law during the pendency of the proceedings initiated by AWI's Motion.

AWI's Motion demonstrates that the Virginia judgment (LUA Mem. Exh. E), as interpreted by the Virginia

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[4] Under full faith and credit, a state court may apply its own principles if the highest court of the state rendering the judgment has not spoken on a particular point. *See* 50 C.J.S. *Judgments* § 869 (1947 & 1989 Supp.) (if law of state in which judgment is rendered is not proven to be different, finality of judgment may be determined by law of state where judgment is invoked).

[5] On the subject of judicial economy, we note that it was LUA who resisted AWI's efforts to have the Virginia action stayed pending the outcome of AWI's more comprehensive Georgia action (AWI's reply to LUA's Motion to Dismiss, p. 2, n.3, R. 1622, 1623; AWI SJ Br. p. 2, R. 895, 919).

[6] The Virginia Supreme Court held in *Council v. Commonwealth*, 198 Va. 288, 94 S.E.2d 245 (1956), that Virginia trial courts have inherent power to correct their judgments.

Supreme Court, is evidently an incorrect statement of what the trial court ruled on the record prior to entering that judgment. In such circumstances, § 8.01-428(B) and the court's inherent authority specifically permit a correction of the judgment. *See, e.g., Lamb v. Commonwealth*, 222 Va. 161, 163, 279 S.E.2d 389, 391 (1981) (trial court may correct errors arising from oversight or inadvertent omission and not just clerical errors).

The Virginia trial court's granting of AWI's Motion will lay the foundation for an appeal of the very judgment LUA seeks to offer as a bar to this action and these appeals (AWI Mem. p. 12, App. A). It would clearly be inappropriate for this Court to grant *res judicata* effect to a judgment subject to a pending motion to correct and further appeal.

Finally, in apparent recognition of the fact that the Virginia trial court judgment is not final for *res judicata* purposes, LUA also seems to argue that this Court should grant full faith and credit to the September Order of the Virginia Supreme Court denying AWI's petition for appeal (LUA Mem. p. 7). While the Virginia Supreme Court Order finally disposed of AWI's petition for appeal, it is not a "judgment" of a sister state on any issue before this Court. That Order did not decide the "damages" issue sought to be precluded in these appeals. Rather, the Order was a mere procedural one concerning appealability that has no relevant preclusive effect here.

C. LUA Has Failed To Prove That All The Prerequisites For Res Judicata And Collateral Estopppel Are Present Here

For LUA to succeed it must prove that (1) all claims asserted by AWI in this action were conclusively resolved by the Virginia judgment, and (2) this was done in the same cause of action. LUA has not done so.

1. *The Assignment Issue Was Not Decided By The Virginia Trial Court*

LUA complains that it "should not now be required to relitigate the exact same issues against AWI" (LUA Mem. p. 3). However, not all the issues currently before this Court were decided by the Virginia trial court. That court specifically reserved a decision on the "assignment" question (LUA Mem. Exh. E (court "assumes but does not decide that the policies . . . were validly assigned")). Since the assignment question was thus not decided, this appeal and the case below cannot be dismissed with respect to LUA. The assignment issue relates not only to the current insurance coverage dispute, but also to other claims which may entitle AWI to coverage under LUA's policies (*see* AWI's Second Amended Complaint ¶¶ 32, 33, R. 1601, 1605). AWI is therefore clearly entitled to a ruling from the Georgia courts on this issue with respect to LUA.

2. *LUA Has Not Proven That The Causes Of Action Are The Same*

For LUA to succeed it must not only prove that all claims asserted by AWI were conclusively resolved by the Virginia trial court, but also that the same cause of action underlying this case was asserted and decided in the Virginia action. *See, e.g., Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917, 921 (1974), where the Virginia Supreme Court explained the *res judicata*-bar as precluding "relitigation of the *same cause of action*, or any part thereof which could have been litigated. . . ." 202 S.E.2d at 920 (emphasis in original). LUA has not met its burden. LUA's Virginia complaint merely sought declaratory relief. AWI in this action seeks damages for breach of contract, as well as declaratory relief looking to the future. LUA has erroneously relied on Georgia law[7] in its

[7] *McCracken v. City of College Park*, 259 Ga. 490, 384 S.E.2d 648 (1989), and *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d

assertion that the causes of action in the Virginia and Georgia actions are identical, even though Virginia law on this question is available and therefore controlling.

As illustrated by *Carter v. Hinkle*, 189 Va. 1, 52 S.E.2d 135, 128-40 (1949), Virginia law strictly defines what constitutes a cause of action, permitting what in other jurisdictions might be considered a splitting of causes of action. The plaintiff in *Hinkle* had suffered both property damage and personal injury as a result of a single wrongful act (an automobile accident), the Virginia Supreme Court, following the minority view, held that he could maintain two separate actions, one for each injury. This rule appears to be contrary to the general rule set forth in *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980) (LUA Mem. p. 6), that different remedies may not be pursued in different actions. However, since the Virginia Supreme Court has spoken on this question, this Court is bound by the Virginia rule under full faith and credit.

3. *The Prerequisites For Collateral Estoppel Have Also Not Been Met*

LUA's Motion also cannot be granted on collateral estoppel grounds, since it again relies on Georgia cases when controlling Virginia law in available (LUA Mem. p. 7, citing *Greene, supra*). As noted by the Virginia Supreme Court in *Bates, supra*, 202 S.E.2d at 921, collateral estoppel under Virginia law precludes relitigation of "any *issue of fact* actually litigated and essential to a valid and final judgment" (emphasis in original). No issue of fact was litigated in the Virginia judgment, which was decided on summary judgment and addressed only legal questions of contract interpretation. Also, the

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796 (1980) (LUA Mem. pp. 5-6), involved the *res judicata* effect of Georgia judgments and therefore applied Georgia principles to determine what constitutes the same cause of action.

Virginia Supreme Court specifically pointed out in *Bates* that Virginia courts apply collateral estoppel with "less rigor" than *res judicata*, where the issue resolved is purely a question of law, as in the case here. 202 S.E.2d at 921, n.6. This Court should follow the Virginia rule and apply collateral estoppel here with "less rigor." Such an approach is especially warranted since the Virginia judgment, in determining that the term "damages" in LUA's policies did not cover "response costs," relied solely on federal cases interpreting Maryland law, and construed a Georgia contract without any reference to Georgia law or, for that matter, to Virginia law. It would not make sense for this Court to give the Virginia judgment greater preclusive effect in Georgia than it would have at home.

Of course, the same considerations with respect to the lack of finality of the Virginia judgment and the infirmity of Virginia Supreme Court's Order denying AWI's petition for appeal, set forth above with respect to *res judicata*, also apply here. Collateral estoppel effect cannot be granted in the absence of finality of the judgment pleaded as a bar.

CONCLUSION

For all the reasons set forth above, this Court should dismiss LUA's Motion and proceed with deciding the appeals on the merits.

Respectfully submitted,

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Counsel for Appellant
Atlantic Wood Industries,
Inc.

[All exhibits referred to in Appendix A have been omitted.]

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for all parties with a copy of the within and foregoing by placing a copy in a properly addressed envelope with adequate postage thereon and depositing in the United States Mail, this day of December, 1989.

This 22d day of December, 1989.

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This 22 day of December, 1989.

/s/ Arnold C. Young
ARNOLD C. YOUNG

APPENDIX B

IN THE COURT OF APPEALS
STATE OF GEORGIA

ATLANTIC WOOD INDUSTRIES, INC.,
Appellant,

v.

LUMBERMEN'S UNDERWRITING ALLIANCE,
CONTINENTAL CASUALTY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA and
RANGER INSURANCE COMPANY,
Appellees.

Appeal From Superior Court of Chatham County
No. X87-1019-B

Appeal Nos. A90A0100, A90A0101

SUPPLEMENTAL POST-ARGUMENT MEMORANDUM OF APPELLEE LUMBERMEN'S UNDERWRITING ALLIANCE

Appellee Lumbermen's Underwriting Alliance ("LUA") respectfully submits this supplemental memorandum to reply to the Supplemental Post-Argument Memorandum of Atlantic Wood Industries, Inc. ("AWI").

I. ARGUMENT

* * * *

B. *The Court of Appeals May Consider LUA's Res Judicata Motion*

* * * *

The procedural history of this matter shows that LUA asked Judge Brannen to dismiss the matter as to it on the basis of *res judicata* after the court had heard oral argument on the various cross-motions for summary judgment, the granting and refusal of which underlie the appeals now under consideration. AWI's assertion notwithstanding, the Superior Court of Chatham County simply ignored LUA's *res judicata* plea, having first reached LUA's summary judgment motion and, moreover, having ruled in LUA's favor on it.

Two bases underlie this Court's power, indeed obligation, to consider LUA's Motion to Dismiss pending before it.

First, under general principles of appellate review, "the appellate court may affirm the judgment where it is correct on any legal ground or theory disclosed by the record, regardless of the ground, reason, or theory adopted by the trial court." 5 C.J.S. Appeal & Error § 1464(1) (1958). The trial court's rationale "may extend to matters which appear in the record and were presented to the lower court, *even though they were ignored* or rejected by that court." *Id.* The Supreme Court of Georgia and this Court routinely apply the general rule that underlies this appellate practice, namely that a judgment, correct for any reason, will be affirmed by the appellate courts. *E.g.*, *Hill v. Willis*, 224 Ga. 263, 267, 161 S.E.2d 281 (1968); *Tierce v. Davis*, 121 Ga. App. 31, 172 S.E.2d 488 (1970).

Judge Brannen apparently undertook consideration of LUA's motions in the order in which they were filed, granted the earlier motion for summary judgment, thus disposing of the case as to LUA, and did not rule on the later-filed plea of *res judicata*. However, as the trial court had the *res judicata* plea before it, this Court may consider the plea of *res judicata* as a basis for dismissing this case as to LUA or affirming the trial court's judgment although not relied upon by the trial court.

* * * *

II. CONCLUSION

For the reasons stated above, and those in LUA's Brief in Support of its Motion to Dismiss, this Court may properly consider the *res judicata* effect of the judgment of the Circuit Court of the County of Henrico and, moreover, must dismiss this action as to LUA.

LUMBERMEN'S UNDERWRITING ALLIANCE

By Counsel

/s/ Mary Louise Kramer
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S. VERNON PRIDDY, III
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/s/ C. Dale Harman
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CERTIFICATE

This is to certify that I have this 27 day of February, 1990, provided all counsel with a copy of the foregoing Supplemental Post-Argument Memorandum of Appellee Lumbermen's Underwriting Alliance by placing the same in the United States mail, with adequate postage thereon, and addressed to:

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SANDS, ANDERSON, MARKS & MILLER

/s/ Mary Louise Kramer
MARY LOUISE KRAMER

APPENDIX C*

LUMBERMEN'S UNDERWRITING ALLIANCE

[LOGO]

U. S. Epperson Underwriting Company, Manager
A Member Company of the Lynn Insurance Group
2501 N. Military Trail
Boca Raton, Florida 33431-6398

May 11, 1990

Mr. Arnold C. Young
Hunter, Maclean, Exley & Dunn
P. O. Box 9848
Savannah, Georgia 31412-0048

RE: Matty v. AWI, et al

Dear Mr. Young:

We have reviewed your letter of April 24, 1990 in which you request reimbursement of costs incurred by Atlantic Wood Industries, Inc. in defense of the above referenced matter. For the reasons mentioned in our letters to you dated July 7, 1987 from our General Counsel and August 11, 1987 from our outside counsel, we respectfully decline to provide reimbursement for any costs in the Matty litigation. Copies of those letters are attached.

Yours truly,

/s/ Michael W. Jones
MICHAEL W. JONES
Claims Department Counsel

MWJ/mm
DW2

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* Business letter reproduced typographically from original.

Attachments [omitted]

cc: Mr. Ronald A. Blake
cc: Mr. I. H. Wicknick
cc: Mr. Frank B. Miller
Sands, Anderson, Marks & Miller
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cc: File